Supreme Court, U. S.
FILED
SEP 17 1980
MICHAEL RODAK, JR., CLERK

80-441

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioners, Gulf Oil Company and the Oil, Chemical and Atomic Workers International Union, Local No. 4-23, and Oil, Chemical and Atomic Workers International Union, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on June 19, 1980.

QUESTIONS FOR REVIEW

1. Whether during the pendency of a class action, a United States district court can constitutionally enter an order limiting certain communications between plaintiffs or their attorneys and potential or actual class members not yet formal parties to the action, in order to prevent actual and potential abuses of the class action device?

2. Whether the court of appeals can refuse to consider the time a charge is pending before the EEOC in applying the doctrine of laches?

3. Whether the court of appeals' decision erroneously allowed the EEOC's two-letter system to abrogate the jurisdictional requirements prescribed by Congress under Title VII?

PARTIES BELOW

The following is a listing of all parties to the proceeding in the court of appeals, as required by Supreme Court Rule 21.1(b):

1. Wesley P. Bernard; Elton Hayes, Sr.; Rodney Tizeno; Hence Brown, Jr.; Willie Whitley and Willie Johnson; plaintiffs.

2. The class of all black employees now employed or formerly employed by defendant, Gulf Oil Company, in Port Arthur, Texas, and all black applicants for employment at Gulf Oil Company who have been rejected for employment at said company.

3. Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 and Oil, Chemical and Atomic Workers International Union, defendants.

4. International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers, Local Union No. 390; International Brotherhood of Electrical Workers, AFL-CIO; United Transportation Local Union; International United Transportation Union; Bricklayers, Masons, and Plasterers International Union, Local 13; and International Bricklayers, Masons, and Plasterers Union: prospective defendants named in plaintiffs' motion to join additional defendants and for leave to amend the complaint. This motion was pending when the district court granted summary judgment for the existing defendants.

5. Gulf Oil Corporation, Defendant-Appellee; Affiliates of Gulf Oil Corporation are as follows:

Afran Bahamas Limited; Afran Transport Company; J-Jin Chemical Company, Ltd.; American Heavy Lift Shipping Company; Andogas S.A.; Argentine Gulf Oil Company; Australian Gulf Oil Company; Bahamas Gulf Oil Company; Belgulf Tankers N.V.; Bio Research Center Company, Limited; Blackships, Inc.; Bolivian Gulf Oil Company; Brazilian Gulf Oil Company; Britama Tankers Limited; Bulk Petroleum Corporation; Burgan Pension Fund Trustees Limited; Cabinda Gulf Oil Company; Caribbean Gulf Refining Corporation; China Gulf Oil Company Limited; China Gulf Plastics Corporation; Chinhae Chemical Company, Ltd.; Colombian Gulf Oil Company; Colonial Pipeline Company; Compania Ecuatoriana Texaco y Gulf, S.A.; Compania Maritima Rio Gulf S.A.; Compania Petrolera Aguarico, S.A.; Coral Gulf Oil Company; County Airport Corporation; Dansk Olia-Import A/S; Det Gronlandske Olieaktieselskab; Dixie Pipeline Company; Eastern Gulf Oil Company Limited; Eastern Venezuela Gas Transport Company; Ecuadorian Gulf Oil Company; Explorer Pipeline Company; Four Corners Pipe Line Company; The "400" Oil Co., (A Division of Bulk Petroleum Corporation); Frisia Minerallolien B.V.

The Gaelic Oil Company Limited,; Global Energy Operations and Management Company-International (A Division of Transocean Gulf Oil Company); Global Energy Operations and Management Company, Ltd.; Global Energy Operations and Management Company-U.S. (A Division of Gulf Oil Corporation); Grand Bay Co.; Gulf Agricultural Chemicals Company Limited; Gulf Asian Investments Company Limited; Gulf Asian Services (A Division of Gulf Asian Investments Company Limited); Gulf Benzin A/S; Gulf Chemicals International, Inc.; Gulf Computer Sciences Incorporated; Gulf Consumer Services Company (A Division of Gulf Oil Corporation); Gulf del Peru, S.A.; Gulf Ecuatoriana de Petroleo, S.A.;

Gulf Energy and Minerals Company (A Division of Gulf Oil Corporation); Gulf Energy and Minerals Company-International (A Division of Gulf Oil Corporation); Gulf Energy and Minerals Company-U.S. (A Division of Gulf Oil Corporation); Gulf Europe Company; Gulf-Gas (Norway) A/S; Gulf-Gas (Sweden) Aktiebolag; Gulf International Company; Gulf International Trading Company (A Division of Gulf Oil Corporation); Gulf International Trading Company (A Division of Gulf Oil Trading Company, Limited).

Gulf International Trading-Far East (A Division of Gulf Asian Investments Company Limited); Gulf Italia Production Company S.p.A.; Gulf Italiana S.p.A.; Gulf Kuwait Company; Gulf Management Institute (A Division of Gulf Oil Corporation); Gulf Marine and Services Company Limited; Gulf Marine Management Company (A Division of Afran Transport Company); Gulf Merchandising Company (A Division of Bulk Petroleum Corporation); Gulf Mineral Resources Co. (A Division of Gulf Oil Corporation); Gulf Minerals Canada Limited; Gulf Oil (Antilles) Inc.; Gulf Oil (Belgium) S.A.; Gulf Oil Canada Limited; Gulf Oil Chemicals Company (A Division of Gulf Oil Corporation); Gulf Oil Chemicals Company Asia, Limited; Gulf Oil Communications Company, Inc.; Gulf Oil Company-Asia; Gulf Oil Company-Eastern Hemisphere; Gulf Oil Company (Hong Kong) Inc.; Gulf Oil Company-International (A Division of Gulf Oil Corporation); Gulf Oil Company-Japan (A Division of Gulf Oil Corporation); Gulf Oil Company-Korea (A Division of Gulf Oil Corporation); Gulf Oil Company-Latin America (A Division of Gulf Oil Corporation); Gulf Oil Company (Nigeria) Limited; Gulf Oil Company of Gabon; Gulf Oil Company (Portugal) Limitada; Gulf Oil Company-South Asia.

Gulf Oil Company-Thailand (A Division of Gulf Oil Corporation); Gulf Oil Company-U.S. (A Division of Gulf Oil Corporation); Gulf Oil European Company;

Gulf Oil Financial Corporation; Gulf Oil Foundation of Delaware; Gulf Oil Germany, Inc.; Gulf Oil (Great Britain) Limited; Gulf Oil (Luxembourg) S.A.; Gulf Oil Marine Agency N.V.; Gulf Oil Middle East Trading Company (A Division of Gulf Oil Trading Company, Limited); Gulf Oil (Nederland) B.V.; Gulf Oil Northern Development Company (A Division of Gulf Minerals Canada Limited); Gulf Oil Production Company; Gulf Oil Raffinaderij B.V.; Gulf Oil Real Estate Development Company; Gulf Oil Refining A/S; Gulf Oil Refining Limited; Gulf Oil Sales, Inc.; Gulf Oil Securities Company, Inc.; Gulf Oil Services, Inc.; Gulf Oil (Switzerland); Gulf Oil Terminals (Ireland) Limited; Gulf Oil Trading Company (A Division of Transocean Gulf Oil Company); Gulf Oil Trading (Far East) (A Division of Gulf Asian Investments Company Limited); Gulf Oil Trading Investments Limited; Gulf Oil Zaire S.A.R.L.; Gulf Overseas Trading, Inc.; Gulf Petroleum S.A.

Gulf Refining and Marketing Company (A Division of Gulf Oil Corporation); Gulf Refining Company; Gulf Research & Development Company; Gulf Research Racing Company; Gulf Reston, Inc.; Gulf Reston Properties, Inc.; Gulf Science and Technology Company (A Division of Gulf Oil Corporation); Gulf Supply and Distribution Company Limited; Gulf Technology Europe B.V.; Gulf Tire & Supply Company; Gulf Trading and Transportation (A Division of Transocean Gulf Oil Company); Gulf Trading and Transportation Company (A Division of Gulf Oil Corporation); Gulf Transport Company Aktiebolag; Gulf Travel Club, Inc.; Gulf (U.K.) Offshore Investments Limited; Hagstrom & Knape Oljeaktiebolag; Hutchison-Hayes International, Inc.; Hydrant Servicing Company Limited; Iberian Gulf Oil Company; Indonesia Gulf Oil Company (A Division of Gulf Oil Corporation); Industrial Asphalt (A Division of Gulf Oil Corporation); Insco Limited; Iranian Oil Participants Limited; Iranian Oil Services (Holdings) Limited; Java Gulf Limited; Keydril Company; Keydril Limited; Keydril U.S.A. (A Division of Gulf Oil Corporation).

Key International Drilling Company Limited; Korea Gulf Oil Company; Korea Lubricants Company, Ltd.; Korea Oil Corporation; Kupan Emirates Company Limited; Kupan Financial Company (Rotterdam) B.V.; Kupan International Company; Kuwait Oil Company Limited; Kuwait Oil Company Trustees Limited; Laurel Pipe Line Company; Lost Hills Water Company; Mainline Pipelines Limited; Mene Grande Oil Company; Michigan Stations (A Division of Bulk Petroleum Corporation); Michigan Stations-Personnel Services (A Division of Bulk Petroleum Corporation); Midcaribbean Investments Limited; Mozambique Gulf Oil Company; National Butane Company; Nedgulf Tankers B.V.; A/S Nordisk Flaskegas; A/S Nordisk Flaskegas Holding Co.; Nordisk Gulf-Gas A/S; Norsk Gulf A/S; Northeast Stations & Services, Inc.; Norwegian Gulf Oil Production Company; Okan Pipeline Company; Okinawa Sekiyu Seisei Company, Ltd.; B. V. Olie Handelsvereeniging (Oil Trading Association); Pacific Gulf Oil Limited; Pennsylvania Oljeimport Aktiebolag; Petroleo Gulf do Brasil Limitada.

Petroleos Gulf de Guatemala, S.A.; Petroleos Gulf del Ecuador C.A.; Petroleum Products Storage and Transport Company S.A.; Petrosil Oil Company Limited, The Pittsburg & Midway Coal Mining Company, Productos Latinoamericanos, S.A.; Propet Company, Limited; Refineria de Petroleos del Norte S.A. (Petronor); SARNI, S.p.A.; Shawinigan Products Corporation; Sociedad Anonima Espanola de Lubrificantes (SAFL); SOLVO Finance and Investment Corporation Ltd.; South Pacific Gulf Oil Company; Spanish Gulf Oil Company; Spencer Quimica Mexicana, S.A. de C.V.; Sunrise International Company, Limited; Svenska Aktiebolaget Alfred Olsen & Co.; Svenska Gulf Oil AB; Taiwan VCM Industries Corporation; Transocean Chemicals Company; Transocean Chemicals Company (Hong Kong) Limited; Transocean Gulf Oil Company; Transport Oil Company-Madison (A Division of Bulk Petroleum Corporation); Transport Oil Company-Milwaukee (A Division of Bulk Petroleum Corporation);

United Petroleum Securities Corporation; Venezuela Gulf Refining Company; Venture Acceptance Corporation; Venture Out in America, Inc.; Veritas Oil Company Aktiebolag; Warren Petroleum Company (A Division of Gulf Oil Corporation); West Texas Gulf Pipeline Company; and Zaire Gulf Oil Company.

WM. G. DUCK
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OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc,* is reported at 619 F.2d 459 and appears in Appendix A. The order of the court of appeals granting a rehearing *en banc,* is reported at 604 F.2d 449, and appears in Appendix B. The vacated panel opinion of the court of appeals, of which parts I, II, and III are adopted by the *en banc* opinion, is reported at 596 F.2d 1249 and

appears in Appendix C. The first order of the district court limiting communications is unreported, but appears in Appendix D, while the second order limiting communications appears in Appendix E. The order of the district court denying Plaintiffs' motion to communicate with members of the proposed class appears in Appendix L. The order of the district court granting Defendant's motion for summary judgment appears in Appendix F.

JURISDICTION

The judgment of the court of appeals, following a rehearing *en banc* was entered on June 19, 1980. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES, AND FEDERAL RULES INVOLVED

UNITED STATES CONSTITUTION

Amendment I

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

UNITED STATES CODE

§ 1981. Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citi-

zens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1976)

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000(e)(2)(a) (1976)

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any indi-

vidual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000(e)(2)(c) (1976)

FEDERAL RULES

Rule 23(d) Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

Fed. R. Civ. P. 23(d)

STATEMENT OF THE CASE

I. Background and Proceedings Before the District Court

Respondents are six present or retired black employees of Gulf's Port Arthur, Texas Refinery. On May 18, 1976, Respondents filed a purported class action suit in federal district court alleging that Gulf engaged in policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Such acts allegedly constituted racial discrimination against Respondents and the class they sought to represent which consists of all black employees employed by Gulf in Port Arthur, Texas; all blacks formerly employed in Port Arthur by Gulf; and all black applicants for employment at Gulf who had been rejected for employment (this group had no temporal or geographic limits).

Three of the Respondents, Bernard, Brown and Johnson, filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) in 1967 against Gulf and the Local Union, for which the EEOC found reasonable cause on August 15, 1967. Later Respondent Bernard attempted to file an amended charge in 1976 against the International Union, but this charge was dismissed by the EEOC as untimely. Respondent Whitley filed a charge with the EEOC in 1972 against Gulf, for which the EEOC issued a determination in 1973 that there was no reasonable cause. The EEOC issued Whitley a "notice of right to sue" letter on the same day. (App. G.) Respondent Hayes and Tizeno, at the time suit was filed, had not filed any charges with the EEOC against Gulf or the unions. (App. H.) On February 26,

1975 Respondents Bernard, Brown and Johnson each received a letter from the EEOC stating that Gulf and the Local Union did not wish to entertain conciliation discussions (App. I.) and, in essence, stated no further action was contemplated by the Commission.[1]

On April 11, 1976 Respondents Brown and Bernard received notice of right to sue letters. (App. J.) The EEOC has never issued a right to sue letter to Respondent Johnson. (App. K.) This suit was filed on May 18, 1976, within 90 days after Respondents Brown and Bernard received the right to sue letters; but was not filed within 90 days after they received the EEOC's failure of conciliation letter.

At the same time the individual charges of discrimination were pending conciliation discussions between Gulf, the EEOC and the Office for Equal Opportunity, Department of the Interior (OEO), were being conducted pursuant to a Commissioner's charge issued by the EEOC in 1968. The negotiations between Gulf, the EEOC, and the OEO relating to the Commissioner's charge took place over a period of several years. A Conciliation Agreement based on the Commissioner's charge was reached on April 14, 1976, providing an award of over $900,000 to 614 present and former black employees and 29 female employees at Gulf's Port Arthur Refinery. Neither Gulf nor the Unions conducted conciliation discussions on the individual charges.

As soon as the Conciliation Agreement was finalized, Gulf, pursuant to the terms of the Conciliation Agree-

1. On March 2, 1976, the EEOC national office conveyed its decision of February 2, 1976 not to sue to its District Director in Houston. (See *amicus curiae* brief *en banc* of EEOC.)

ment, mailed a letter and release, the form of which was approved by the federal agencies, notifying all employees covered by the Conciliation Agreement that they were entitled to an award of back pay and that upon execution of the receipt and general release the employees would receive the back pay award. At the time this action was filed approximately 431 black employees out of a total of 614 employees entitled to a back pay award had executed the receipt and general release and had received their back pay checks.

On May 22, 1976, five days after the instant action was filed, attorneys for Respondents attended a meeting of 75 actual or potential class members and discussed with them the issues involved in the case and recommended to those employees that they not sign the receipt and general release which had been mailed to them pursuant to the Conciliation Agreement. In fact, it was reported to Gulf by an individual attending the meeting that an attorney for Respondents advised this group that they should mail back to Gulf the checks they had received since they could recover at least double the amount which was paid to them under the Conciliation Agreement by prosecuting the present lawsuit.

Without putting at issue the circumstances surrounding the meeting and in an effort to safeguard against the potential for abuse of the class action process, Gulf sought an order to limit communications between potential class members and all parties and their counsel to this lawsuit. This order was entered on May 28, 1976 by District Judge Steger, ruling in Chief Judge Fisher's absence without formal objection by Respondents. (App. D.) At the

same time, Gulf voluntarily ceased to issue back pay awards and collect releases.

Upon motion by Gulf, and after extensive briefing accompanied by affidavits and a hearing, the order limiting communications was subsequently modified by Judge Fisher on June 22, 1976, to permit Gulf to proceed in accordance with the Conciliation Agreement. (App. E.) The language of the order was changed to permit constitutionally protected communications while limiting only those communications that had the purpose of solicitation and that tended to misrepresent the status, purposes and effects of the cause of action and that impeded the orderly administration of justice. The modified order was copied almost verbatim from "Suggested Local Rule No. 7—Prevention of Potential Abuses of Class Actions" contained in the *Manual for Complex Litigation,* 1, (Pt. 2) J. Moore *Federal Practice,* Pt. II, § 1.41 (1979).

On July 6, 1976, Respondents and their attorneys moved for permission to communicate with members of the proposed class tendering to the court the substance of the communication in the form of a pamphlet or "handout." Permission was denied as Respondents' communication tended to misrepresent the status, purposes and effects of the cause of action. (App. L.)

Thereafter, Respondents filed a Motion to Amend the Complaint which was granted on July 19, 1976. Gulf filed a Motion to Dismiss the Amended Complaint, in which the Local and the International Unions joined. No formal discovery by way of depositions, interrogatories or requests for admissions had been undertaken by either party and there had been no class certification hearing.

Gulf moved to dismiss on the following grounds: (1) Respondents had failed to meet the jurisdictional prerequisites for maintaining the action; (2) the action was barred by the statute of limitations; (3) the action was barred by laches; and (4) the Complaint failed to name a proper class representative. Gulf submitted numerous affidavits in support of the motion, including that of Mr. C. B. Draper, a Gulf employee, which stated several important witnesses had died and many relevant documents had been destroyed. (App. N.) Oral arguments were heard on this Motion on September 24, 1976.

On November 29, 1976, the court on its own motion ordered that the Motion to Dismiss the Complaint be treated as a Motion for Summary Judgment and gave each side until January 3, 1977 to submit any other relevant material. (App. M.) On January 11, 1977 the court granted Summary Judgment in favor of Gulf (App. F.)

In this order, the court held that since neither Respondents Hayes nor Tizeno had filed a Complaint with the EEOC, they could not maintain suit in their own right or adequately represent a class. As to Respondents Bernard, Johnson and Brown, the court held that since more than 90 days had elapsed between the receipt of the notice issued by the EEOC under § 706(f) of the Act and the filing of this lawsuit, their Title VII claims were time barred. Respondent Whitley's complaint was dismissed as time barred since he had not filed suit within 90 days of either the EEOC's first notice or right to sue notice.

Furthermore, the court held that Respondents § 1981 claim was barred by the applicable two-year statute of

limitations since nine years had elapsed before suit was filed. The court found no circumstances of continuous discrimination. Finally, the court found a compelling argument for the application of the equitable doctrine of laches in this particular case.

II. Proceedings Before the Court of Appeals

Respondents appealed to the United States Court of Appeals for the Fifth Circuit, and on June 15, 1979 that court reversed and remanded the case to the district court. 596 F.2d 1249 (5th Cir. 1979). (App. C.) The Fifth Circuit concluded that Gulf had not met its summary judgment burden of establishing the absence of any material issue of fact and held that neither the statute of limitations nor the equitable doctrine of laches barred Plaintiff's claims. The court did, however, declare that the order limiting the parties' communications with members of the putative class was a permissible exercise of the district court's discretionary power to control a class action under Rule 23(d) of the Federal Rules of Civil Procedure. After motion duly made by all parties, the court of appeals subsequently granted a petition for a rehearing *en banc*. 604 F.2d 449 (5th Cir. 1979).

On June 19, 1980, the court of appeals issued its *en banc* decision in the instant case. 619 F.2d 459 (5th Cir. 1980). (App. A.) The court affirmed the panel's reversal of the district court's grant of summary judgment and remanded the case to the district court. Furthermore, the Fifth Circuit sitting *en banc* vacated the order of the district court limiting communications.

REASONS FOR GRANTING THE WRIT

This Petition raises substantial and important questions concerning the administration of class actions in the federal courts and the power of district courts to prevent actual and potential abuses of the class action device under Rule 23(d) of the Federal Rules of Civil Procedure. The issues raised in the instant case have not yet been passed upon by this Court. In this case, the Fifth Circuit invalidated a district court's order which provided for court supervision of communications with potential members of an alleged class. The order was entered after extensive briefing and a hearing where allegations were made of actual abuses of the class action device. As the district court's order was based directly upon the proposed order recommended by the *Manual for Complex Litigation*,[1] the Fifth Circuit's opinion is in conflict with the distinguished Board of Editors of the Federal Judicial Center. Moreover, as the *Manual's* suggested rule and order has been adopted by numerous district courts across the nation, the Fifth Circuit's decision has implications and importance which reach far beyond the facts of the instant case. Furthermore, the language of the Fifth Circuit's opinion is in conflict with a decision of the United States Court of Appeals for the Second Circuit in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intl. Inc.*, 455 F.2d 770 (2d Cir. 1972).

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1. Federal Judicial Center, *Manual for Complex Litigation*, reprinted in 1 (pt. 2) J. Moore, *Federal Practice, Manual for Complex Litigation* Pt. II, § 1.41 (1979).

I. THE DECISION OF THE COURT OF APPEALS CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The order limiting communications was entered after it was demonstrated to the district court's satisfaction that the interest of actual and potential class members, not yet parties to the suit, were threatened by reported abuses of the class action procedure. The substance of the Order, which the court of appeals ordered vacated, was taken almost verbatim from that suggested in the *Manual for Complex Litigation*.[2] Although the provisions of the *Manual* are not obligatory upon the district courts, they represent "a collection of procedures which are 'recommended,' because, as a product of experience in the development of able minds, they are deemed worthy of consideration by all. . . . The *Manual* is a collection of suggested procedures for the handling of complex cases written by judges for judges after receiving the widest possible range of suggestions and criticisms from the Bench and Bar."[3] The Fifth Circuit's invalidation of an order suggested by the eminent panel of legal scholars of the Federal Judicial Center warrants the attention of this Court. As this Court exercises a supervisory authority over the federal courts, it is urged that the Court should clarify the conflict between the Federal Judicial Center's approach to prevention of class action abuses and the Fifth Circuit's opinion in the instant case.

Since the local rule suggested by the *Manual* has been adopted in numerous districts, *see, e.g.*, S.D. Fla. R. 19;

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2. *Manual, supra* at § 1.41.

3. *Id.* at XXVI (1977 ed.).

N.D. Ga. R. 221.2, 3; N.D. Ill. R. 22; D. Md. R. 20; M.D. N.C R 17(b)(6); S.D. Ohio R. 3.9.4; S.D. Tex. R. 6; W.D. Wash. R. 23(g), and since individual orders have also been entered independently of local rules of the suggestion of the *Manual, see, e.g., N.O.W. v. Minnesota Mining & Manufacturing Co.*, [1977] 18 Lab. Rel. Rep. (BNA) (Fair Empl. Prac. Cas.) 1176, 1179, the Fifth Circuit's decision is in conflict with a broad spectrum of the judiciary.[4] The Fifth Circuit's condemnation of the *Manual's* model rule and order for the prevention of class action abuses contrasts sharply with federal practice in other circuits, as evidenced by the fact that the *Manual's* model rule has been adopted in certain district courts of the Third, Fourth, Sixth, Seventh, and Ninth Circuits listed above. The Fifth Circuit's decision in the instant case also conflicts with a district court order issued in the Eighth Circuit which was patterned after the *Manual's* suggested order. *N.O.W. v. Minnesota Mining & Manufacturing Co., supra.*

In addition, the court of appeals below has rendered a decision in conflict with the decision of the United States Court of Appeals for the Second Circuit which considered whether district courts had power to regulate communications of parties involved in class action litigation. In *Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intl. Inc., supra,* the Second Circuit refused to issue a writ of mandamus requiring a district court to vacate an order similar to the order in controversy in the instant

4. On the basis of its *en banc* decision in *Bernard,* the Fifth Circuit invalidated Local Rule 17 of the United States District Court for the Northern District of Florida which limited communications in class actions. *See In Re Lilla Ann Norton,* 622 F.2d 917 (5th Cir. 1980). Thus the Fifth Circuit seems to draw no distinction between local court rules and orders limiting communications.

case. The district court in *Weight Watchers* had entered an order in the form suggested by the then current edition of the *Manual for Complex Litigation,* prohibiting the formal parties from communicating with nonparty class members without court approval. The district court subsequently modified the order by allowing limited communications in the form of contract negotiating sessions initiated and requested only by the non-formal party class members.

Even though the order issued by the district court in the *Weight Watchers* case was more restrictive than the order entered by the district court in the instant case, the Second Circuit, in refusing to issue a writ of mandamus, held that the order "was well within the wide range of discretion in the management of class actions necessarily accorded the district judge by F. R. Civ. P. 23(d)." *Weight Watchers, supra* at 775. This conclusion by the Second Circuit Court of Appeals is particularly noteworthy in that the order at issue in the *Weight Watchers* case did not include the provision permitting communication without court approval when the formal parties or their attorneys had a good-faith belief that such communication was protected by the First Amendment. As the order involved in the instant case included a provision which specifically permitted protected speech without prior approval, the order was much less constitutionally onerous than the order upheld by the Second Circuit's refusal to issue the writ of mandamus in the *Weight Watchers'* decision. Therefore, the Fifth Circuit's conclusion that the protective order suggested by the *Manual for Complex Litigation* is unconstitutional as a prior restraint is in direct conflict with the Second Cir-

cuit's finding that implementation of the *Manual's* suggested order is well within the discretionary power of federal district courts.

The sharply divergent views on the *Manual's* suggested order between the Second Circuit and Fifth Circuit warrant this Court's grant of review of the Fifth Circuit decision. The fact that a nationwide sampling of federal district court rules demonstrates an acceptance of the Second Circuit's views on the soundness of the *Manual's* suggestion presents an even more compelling reason that this Court should address the controversy.

II. THE DECISION OF THE COURT OF APPEALS RELATING TO LACHES IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

The court of appeals below has rendered a decision in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977). In *Lynn*, the Ninth Circuit held that it would be proper for the district court to take the plaintiff's lack of diligence into account in determining the amount of back pay, if any, to be awarded the plaintiff should he prevail on the merits. *Id.* at 1288. Specifically, the court held: "The complainant should not be permitted to prejudice the employer by taking advantage of the Commission's slowness in processing claims or by procrastinating while being aware that the Commission intends to take no further action." *Id.* at 1287.

Recently, the Ninth Circuit held that laches may be used as a complete defense to a Title VII claim brought by a private litigant. *Boone v. Mechanical Specialties Co.*,

609 F.2d 956 (9th Cir. 1979). In *Boone,* the court of appeals affirmed the opinion of the district court which found that Boone's delay in bringing suit was unreasonable. Boone failed to request a Notice of Right to Sue until seven years after he filed a complaint with the EEOC. the court of appeals concluded that they could not read Title VII as providing "for the indefinite tolling of a claim which knowingly lies dormant with the EEOC, to the prejudice of the adversary party." *Id.* at 960.[5]

The present decision is also in conflict with the decision of the Seventh Circuit in *Kamberos v. GTE Automatic Electric, Inc.,* 603 F.2d 598 (7th Cir. 1979). In *Kamberos,* the court of appeals held the time for which back pay was to be computed should be reduced by an amount of time equivalent to the time between the expiration of the 180-day period, after which the plaintiff could have requested a notice of right to sue and the date when the right to sue letter was actually received by the plaintiff. The basis for the Seventh Circuit's decision was that the plaintiff had permitted her charge to lie dormant with the EEOC for over four years despite the fact that EEOC regulations provide for the automatic issuance of a notice of right to sue any time 180 days after filing of the charge with the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1).[6]

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5. The court distinguished *Boone, supra* at 916 n.2, from the decision of the Fifth Circuit in *Bernard,* by suggesting that in *Bernard* there were continuing administrative proceedings up until suit was filed, whereas in *Boone* the court concluded the claim lay dormant for several years. This distinction is inaccurate since the affidavit of Herbert C. McClees, District Director of the EEOC, (App. O) shows that the only EEOC activity in the present case related to the Commissioner's charge and not the individual charges.

6. Once the request is made, EEOC must issue the notice promptly. 29 C.F.R. § 1601.28(a) (1979).

This Court has recognized defenses based upon inexcusable delay which prejudice the rights of adverse parties. Speaking for the Court in *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 424 (1975), Mr. Justice Stewart made it clear that a private plaintiff in a Title VII action may be barred from asserting a claim for back pay on behalf of class members if his conduct was prejudicial to the other party. Later, in *Occidental Life Insurance Co. of California v. Equal Employment Opportunity Commission,* 432 U.S. 355, 373 (1977), Mr. Justice Stewart stated that the EEOC may be barred from filing a suit if it delayed inexcusably and the defendant was materially prejudiced by the delay.

In the instant case there was a nine-year delay between the date Respondents filed their EEOC charge and the date they filed this suit—one of the longest delays in any reported case. The record was clear below that this delay caused severe prejudice to Gulf's ability to defend this case since many key witnesses had died or retired, the management of the plant had changed at least three times and numerous documents had been destroyed during Gulf's normal record retention process. *See* affidavit of C. B. Draper (App. N.).

In its opinion the Fifth Circuit, in essence, held laches can never apply when a Title VII litigant chooses to delay his private remedy and elects to leave his charge pending before the EEOC—no matter how long that process may take.[7] This opinion is in direct conflict with decisions of

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7. "A plaintiff cannot be penalized for choosing to forego this (private remedy) alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC. We therefore hold that plaintiffs' failure to file

the Seventh and Ninth Circuits and pronouncements of this Court. Therefore, a writ of certiorari should be granted to resolve this conflict.

III. THE COURT OF APPEALS' DECISION ERRONEOUSLY ALLOWS THE EEOC'S TWO-LETTER SYSTEM TO ABROGATE THE JURISDICTIONAL REQUIREMENTS PRESCRIBED BY CONGRESS UNDER TITLE VII

Based upon its decision in *Zambuto v. American Telephone and Telegraph Co.*, 544 F.2d 1333 (5th Cir. 1977), the court of appeals held that the limitations period under Title VII within which a charging party must file suit does not begin to run until the EEOC has notified the charging party of both the failure of conciliation and the EEOC's decision not to sue; thus, clearly indicating that the administrative process has been completed. *See also Page v. U. S. Industries Inc.*, 556 F.2d 346 (5th Cir. 1977), *cert. denied*, 434 U.S. 1045, (1978). Although *Zambuto* clearly held that the EEOC improperly extended the jurisdictional time limitations for a charging party to file suit,[8] it also applied equitable principles to extend these jurisdictional time limits where a charging party alleged he had been misled by the two-letter system. By applying *Zambuto* to the instant case, the court below has abrogated the clear jurisdictional

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their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches." *Bernard*, 596 F.2d at 1257.

8. "To the extent that EEOC has adopted the practice which places the commencement of this 90-day period within the claimant's power by bifurcating the statutory notice, it is an invalid procedure which is counter to the plain language of the statute and to the congressional purpose undergirding it." *Zambuto, supra* at 1335.

requirements under Title VII and by doing so is in conflict with decisions of the Supreme Court.[9]

When Congress enacted Title VII it set forth jurisdictional time periods a charging party must follow in order to invoke the jurisdiction of the federal courts. At the time this suit was filed, a charging party was required to file a cause of action in federal court within 90 days of notice that the EEOC's administrative process had been completed. *See* 42 U.S.C. § 2000e-5(f)(1) (1976). In this case, it is undisputed that no respondent filed suit within 90 days of the EEOC's first letter.

As early as 1974, this Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), held that the time limitations under Title VII were jurisdictional. In *Alexander*, the court stated "it [Title VII] does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Id.* at 47.

This Court in *Intl. Union of Electrical, Radio and Machine Workers AFL-CIO, Local 790 v. Robbins and Myers, Inc.*, 429 U.S. 229 (1976) refused to invoke equitable principles to extend the jurisdictional time

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9. *Zambuto* is in harmony with other circuit court opinions, *see, e.g., Lacy v. Chrysler Corporation*, 533 F.2d 353 (8th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 959 (1976); *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301 (8th Cir. 1975) *cert. denied*, 423 U.S. 1052 (1976); *Weaver v. Joseph Schlitz Brewing Co.*, 551 F.2d 122 (6th Cir. 1977); *McGuire v. Aluminum Company of America*, 542 F.2d 43 (7th Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976); *Garner v. E. I. du Pont de Nemours and Co.*, 538 F.2d 611 (4th Cir. 1976); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975).

limitations under Title VII. In this case, a plaintiff had followed the grievance procedure under a collective bargaining agreement prior to filing a charge of discrimination with the EEOC. Upon completion of the grievance procedure and well after the expiration of the 90-day filing period under Title VII, the plaintiff filed his discrimination charge with the EEOC. The Supreme Court rejected plaintiff's equitable arguments holding that Title VII's jurisdictional prerequisites were designed "with precision" citing *Alexander* and emphasizing that "Congress did not leave to courts the decision as to which delays might or might not be 'slight.' " *Electrical Workers, supra* at 240.

Again, in *United Airlines Inc. v. Evans,* 431 U.S. 553 (1977), this Court failed to allow an extension of the jurisdictional time limitations under Title VII where petitioners argued present effects of past discrimination are continuing in nature. In rejecting the petitioner's equitable argument that the jurisdictional time limits should be extended, the court ruled suit had to be filed within 90 days of the act of discrimination.

Once the circuit court below found the two-letter system invalid, as it did in *Zambuto,* decisions of this Court mandate rejection of equitable arguments to extend Title VII's jurisdictional time limits past receipt by the Respondents of EEOC's first letter. Since no Respondent timely filed suit within 90 days of the EEOC's first letter, the district court properly dismissed Respondents' action.

CONCLUSION

For the reasons stated above, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

En Banc Opinion of the United States Court of Appeals for the Fifth Circuit, Dated June 19, 1980.

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al.,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

June 19, 1980.

* * *

Appeal from the United States District Court for the Eastern District of Texas.

Before COLEMAN, Chief Judge, BROWN, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

GODBOLD, Circuit Judge:

This suit was brought as a class action by six present or retired black employees of the Port Arthur, Texas, plant of Gulf Oil Company, under Title VII of the Civil Rights

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* Judges Goldberg, Ainsworth and Charles Clark did not participate in the consideration or decision of this case.

Act of 1964 (42 U.S.C. § 2000e-2) and 42 U.S.C. § 1981. The members of the asserted class are black employees and black former employees of the Port Arthur plant, and black applicants rejected for employment with Gulf Oil (at the Port Arthur plant and elsewhere). The defendants are Gulf Oil and the Oil, Chemical and Atomic Workers' Union.

Plaintiffs charged that Gulf discriminated against blacks in hiring, job assignments, pay scales, discipline and discharge, employed discriminatory tests and racially tainted promotion and progression practices, and denied training to blacks and refused seniority to blacks. They alleged that the union had agreed to, acquiesced in or condoned Gulf's discriminatory practices. The district court dismissed the Title VII claim as untimely filed, granted summary judgment for defendants on the § 1981 claim, and applied laches as an additional ground for its disposition of both claims. With respect to these three holdings, we adopt parts I, II and III of the panel opinion[1] and reverse and remand to the district court. A fourth issue we will consider at length. It concerns the validity of an order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members not formal parties to the suit. By a divided vote the panel found the order valid. 596 F.2d at 1258. We hold that the order violated the First Amendment to the Constitution and Rule 23, Fed.R.Civ.P.

I. *The background*

The facts are accurately stated in the dissenting opinion to the panel decision, 596 F.2d at 1262-76, and the court

1. *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, *vacated*, 604 F.2d 449 (5th Cir. 1979).

adopts that statement. We restate the facts in condensed form.

In April 1976, Gulf and EEOC entered into an extra-judicial conciliation agreement covering alleged racial discrimination against blacks at the Port Arthur plant and providing for conciliation of alleged discriminatory practices and for back pay to 614 present and former black employees. No employees were parties to the agreement. Plaintiffs brought this suit in May 1976, represented by local counsel in association with New York attorneys from the NAACP Legal Defense and Education Fund. Before answering and before a class was certified, Gulf filed an unsworn request that the court enter an order limiting communication by parties and their counsel with actual or potential class members. Gulf asserted that it had received reports that one of plaintiffs' attorneys had attended a meeting of actual and potential class members and had advised the group not to sign receipts and releases sent to them pursuant to the conciliation agreement because he could recover twice as much for them in the suit just filed.

District Judge Steger entered a temporary order on May 28.[2] Gulf filed an additional unsworn charge that the same plaintiffs' attorney had also recommended that employees who had already signed receipts and releases should return their checks. Gulf also filed an affidavit from EEOC which stated that the issues in the suit were almost identical to those embraced in the conciliation agreement.

Plaintiffs challenged the constitutionality of the temporary order. They filed affidavits denying Gulf's charges

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2. It is substantially the same as ¶ 2 of the modified order. *See* n. 4 *infra*.

and a brief asserting that numerous issues in the suit were not within the matters conciliated. On June 22, without proof of the unsworn charges made by Gulf and without entering findings of fact, Chief District Judge Fisher rejected plaintiffs' constitutional arguments and entered a modified order explicitly modeled on that suggested in the *Manual for Complex Litigation,* Part II, § 1.41 (1973 ed.),[3] a publication widely used by federal judges. It is the validity of this modified order that is now before us.

On July 6 plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class and also asked for guidance from the court. They attached a notice, reproduced at 596 F.2d 1266, which they proposed to distribute and asserted that they were constitutionally entitled to distribute. The notice alerted black employees to the existence of the lawsuit as an alternative to acceptance of Gulf's conciliation offer and urged them to talk to an attorney. The time for acceptance of Gulf's conciliation offer expired on or about August 8. On August 10, the court, without explanation, denied plaintiffs' motion by a one-sentence order.

II. *The provisions of the order*

The order, described by plaintiffs as a "gag order," is broad in scope and plenary in nature, forbidding a wide range of communications.[4]

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3. The form of the suggested order is the same in the 1977 edition of the *Manual.*

The 1977 edition also appears at 1 Pt. 2 Moore's Federal Practice, Part II, ¶ 1.41, at 226-28 (2d ed. 1979) and Wright & Miller, *Manual for Complex Litigation,* Part II, § 141 at 188-89 (1977).

4. The order, as modified, provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted:

The persons enjoined are "all parties hereto and their counsel."

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(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

The subject matter forbidden is communications with any actual or potential class member not a formal party,

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(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that

"concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this Court." More specific communications that the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; and (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The order contains several exceptions, set out in the second subparagraph of ¶ (2): communications between attorney and client, and between attorney and prospective client when initiated by the prospective client, and communications in the regular course of business.

The third subparagraph of ¶ (2) is a much-debated provision requiring post-communication filing with the court of any communcation asserted to be constitutionally protected:

> If any party or counsel for a party asserts a constitutional right to communicate with any member

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this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

Bernard v. Gulf Oil Co., supra, 596 F.2d at 1258 n. 9.

> of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

The order also contains a provision that the clerk of the district court send a notice to those employees covered by the conciliation agreement who have not signed receipts and releases for back pay. The notice, which is an appendix to the order, tells the employee that this case is pending, and briefly describes it, and that he has been identified as an actual or potential class member. It describes the outstanding conciliation offer from Gulf and tells the employee that he has a choice of accepting the Gulf offer or declining it and being considered at a later date for inclusion in the class in the suit. Employees are told they have 45 days in which to accept the conciliation offer.

II. *The basis for the order*

Presumably, since the district court made no findings, its order was based upon suggestions contained in the *Manual,* which recommends that procedures be devised to anticipate and prevent potential abuses in class actions, includng solicitation of representation, solicitation of funds and of opt-out requests, and misrepresentations that may create confusion and reflect adversely on the court or the administration of justice. *Manual,* Part I, § 1.41. The *Manual* recommends that district courts adopt local rules imposing "in every potential and actual class action" substantially the ban on communication that is here involved, and in the absence of a local rule[5] impose the

5. The district court here involved had not adopted a local rule.

ban by an order entered promptly after the filing of any actual or potential class action. *Id.*, Part I, § 1.41; Part II, § 1.41 (Suggested Local Rule 7 and Suggested Pretrial Order No. 15).[6] Our interpretation of the basis for the Court's order is reinforced by the court's rejection of plaintiffs' constitutional arguments on the ground that the order it had entered comported with the requirements of the *Manual.*

We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would have been procedurally improper and without evidentiary support. Rather the court appears to have acted upon the rationale of the *Manual* that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual.*[7]

IV. *The order is a prior restraint*

The order represents a significant restriction on First Amendment rights. Because no other court of appeals

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6. The only significant difference between the suggested local rule and the suggested pretrial order is the wording of the rule's "constitutional right" exception. The suggested rule provides: "Nor does the rule forbid communications protected by a constitutional right." It then imposes the same post-communication filing requirements that the order does. While we here consider the constitutionality of the *Manual's* suggested order, much of our analysis is equally applicable to the suggested local rule. *See* n. 22 *infra*. The semantic change does not alter the thrust of the rule.

7. The panel majority interpreted the district court's action as we do. It treated Gulf's charges as irrelevant and considered that the district court had plenary power in a class action to ban communications by a prophylactic order. 596 F.2d at 1261 n. 14.

has ruled on the constitutionality[8] of the *Manual's* suggested rule and order, and because of the broad impact of

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8. In 1975 the Third Circuit raised the constitutional issue and expressed its doubts about the power of the district court to impose a prior restraint on communication or association in *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975) (*Rodgers I*);

> The imposition of such a condition [prior approval] upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3d Cir.), *cert. granted*, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).
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> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney, supra,* and *Bridges v. California, supra,* would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, *supra*, at 29 n. 28.

508 F.2d at 162-63, 165. However, the Third Circuit elected to proceed on a statutory ground, and no circuit has since directly confronted the constitutional issue.

The Second Circuit, in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972), rested its refusal to overturn a similar restriction on the unreviewability of discretionary orders by writ of mandamus, and thus did not deal with the constitutionality of the order.

the *Manual's* suggestions,[9] we address the constitutional issues before us.

[1] We hold that the order entered in this case is an unconstitutional prior restraint.

[2] Prior restraints on freedom of speech have long been disfavored in American law. *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). While a prior restraint is not unconstitutional per se, there is a heavy presumption against its constitutionality. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448, 459 (1975); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1, 5 (1971). We discuss in Part VI, below, the circumstances under which a prior restraint may be held lawful.

[3] Prior restraint has traditionally been defined as a "predetermined judicial prohibition restraining specified expression. . . ." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976); *see*

The 1977 edition of the *Manual* adhered to the position of the 1973 edition. The 1978 Supplement reviews the division in the authorities concerning the validity of the recommended rule and order, but concludes:

> [T]here should be no modification of the foregoing recommendations or of the sample rule and order based thereon, except when a controlling decision of the court of appeals of the circuit requires it.

Id., Part I, § 1.41, p. 3.

9. The local rule suggested by the *Manual* has been adopted in numerous districts. *See* S.D.Fla.R. 19; N.D.Ga.R. 221.2, 3; N.D.Ill. R. 22; D.Md.R. 20; M.D.N.C.R. 17(b)(6); S.D. Ohio R. 3.9.4; S.D. Tex.R. 6; W.D. Wash. R. 23(g). No doubt many ban orders have also been entered independently of local rules, on the suggestion of the *Manual. See, e.g., NOW v. Minnesota Mining and Manuf. Co.,* 18 FEP Cas. 1177 (D. Minn. 1977).

also Nebraska Press Association v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683, 697-98 (1976); *Near v. Minnesota, supra;* Litwack, *The Doctrine of Prior Restraint,* 12 Harv. C. R.—C. L. Rev. 519, 520 (1977). This expansive definition has not often been further elaborated. There are, however, four separate but related features that may serve to distinguish prior restraints from limitations on free speech imposed by subsequent restraints.

[4] 1. *Origin.* A prior restraint is generally judicial rather than legislative in origin, although an enabling statute may authorize the judicial suppression of publication. *Near v. Minnesota, supra.* The essence of prior restraint is that it places specific communications under the personal censorship of the judge. Kalven, *Foreword: Even When a Nation is at War,* 85 Harv. L. Rev. 3, 33 (1971) [hereinafter Kalven].[10]

The district court's order is undeniably judicial in origin.[11]

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10. The classic prior restraint is an administrative licensing scheme adopted pursuant to a statute. The licensor had broad discretion with regard to each publication to be restrained. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Penthouse Int'l, Ltd. v. McAuliffe,* 610 F.2d 1353, 1359-61 (5th Cir. 1980). The distinction between this type of scheme and a more general legislative enactment is that the restraint operates only on specific publications, chosen by the administrator. There is thus less room for diversity to exercise its "tendency to break and control the violence of faction." The Federalist No. 10 (Madison). The same danger exists with respect to judicial restrictions on free speech; indeed, most of the more recent prior restraint cases have involved judicial rather than administrative licensing. *See, e.g., Nebraska Press Association v. Stuart, supra; New York Times Co. v. U. S.,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

11. We need not pass on the validity of the distinction made by the Seventh Circuit in *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248, between courts as judicial bodies and courts as rule-

2. *Purpose.* It has been suggested that the sole purpose of a prior restraint is suppression rather than punishment. *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 558-59, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *Near v. Minnesota, supra,* 283 U.S. at 715, 51 S.Ct. at 630, 75 L.Ed. at 1367. Unlike a criminal statute, which by its terms defines the punishment for its violation, a prior restraint "does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." *Near, supra,* 283 U.S. at 715, 51 S.Ct. at 631, 75 L.Ed. at 1367. The justification for drawing a distinction based on this difference is that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *see also New York Times Co. v. U. S.,* 403 U.S. 713, 733, 91 S.Ct. 2140, 2151, 29 L.Ed.2d 822, 836 (1971) (White J., concurring).

Without question, the purpose of the order is restraint upon publication.

3. *Means of enforcement.* This distinction between prior and subsequent restraints is inextricably linked to the prior restraint's judicial origin and unique purpose. "Punishment by contempt is an important attribute of a 'prior restraint' that distinguishes it from a criminal statute that forbids a certain type of expression." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248.

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making or quasi-legislative bodies. However, since the instant order was promulgated in the course of litigation and not as a local rule, it satisfies even that Circuit's definition of a judicial restraint.

The penalty is thus both more swiftly imposed and less subject to the mitigating safeguards of the criminal justice system than is the punishment for violation of a statute. *See Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2802, 49 L.Ed.2d at 697-98; *U. S. v. Gurney,* 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). This lack of safeguards accentuates the dangers inherent in any suppression of speech. *See Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459-60; *In re Halkin,* 598 F.2d 176, 184 n.15 (D.C. Cir. 1979).

The expression restrained in this case is not forbidden by any statute. The text of the order is silent as to means of enforcement,[12] and there are other possible means available,[13] but the appellees accept that the means of enforcement intended is the contempt power of the court, and we agree.[14]

The dangers associated with the penalty of contempt inhere even though other sanctions are to some extent available. Persons subject to the order before us could reasonably conclude that the court's contempt power ex-

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12. The *Manual* is silent also.

13. Possibily the court could penalize a plaintiff attorney who disobeyed the order by removing him as attorney for the class, or deny or withdraw class action status, *Halverson v. Convenient Food Mart, Inc.,* 458 F.2d 927 (7th Cir. 1972); *Korn v. Franchard Corp.,* 456 F.2d 1206 (2d Cir. 1972); *Kronenberg v. Hotel Governor Clinton, Inc.,* 281 F.Supp. 622 (S.D. N.Y. 1968), or remove as class representative a plaintiff who disobeyed. Sanctions such as these would not be available, however, against defendants and their counsel. With respect to them, contempt would seem to be the only available sanction.

14. Contempt here would be criminal because used to punish past misconduct. *In re Timmons,* 607 F.2d 120, 123-24 (5th Cir. 1979).

tended to enforcement of the order, and the conclusion is inescapable that it was exposure to contempt that silenced plaintiffs' attorneys and caused them to ask leave of court to send out the notice to class members.[15]

Moreover, the potential availability of other sanctions cannot serve to reduce the constitutional infirmity of the order. This prong of the test is concerned primarily with the lack of procedural safeguards associated with the enforcement of prior restraints. The fact that contempt is only one of several alternative sanctions does not ameliorate this concern.

[5-7] 4. *Means of constitutional challenge.* While the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings. *Compare Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) *with Walker v. Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *see U. S. v. Dickinson,* 465 F.2d 496 (5th Cir. 1972), *cert. denied,* 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973) (applying rule against collateral attack to judicial restriction on publication); *cf. In re Timmons,* 607 F.2d 120, 124-25 (5th Cir. 1979) (similar distinction between civil and criminal contempt). Thus, a prior restraint may be distinguished from a statute prohibiting publication in that the former has "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil

15. One who may be willing to violate a statute, and thus risk criminal penalties, may be less willing to act in direct defiance of an injunction or court order and thus subject himself to the court's potential contempt power. *See In re Halkins, supra,* 598 F.2d at 184 n.15; *Rodgers I, supra,* 508 F.2d at 161; Kalven, *supra,* 85 Harv. L.Rev. at 34 & n. 156; Note, 88 Harv. L. Rev. 1911, 1922 (1975).

sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L.Ed.2d at 698. As one commentator has eloquently observed: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech." A. Bickel, The Morality of Consent 61 (1975), *quoted in Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring).

The impact of the present order was direct and immediate. It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, question by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue[16] despite the contentions of plaintiffs' counsel that some of the issues in the suit were not covered by the conciliation agreement to which plaintiffs and putative class members were not parties and that the conciliation benefits to the putative class were inadequate. It stopped investigation and discovery at a time when it is critical, just after suit has been filed.

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16. Exception (2) in the second subparagraph of ¶ (2) permits communication between attorney and client, and between attorney and prospective client if on the initiative of a client or the prospective client. This provision concerning prospective clients is largely illusory; presumably, in a class action, a prospective client (class member) would often learn of the attorney from a present client (a named plaintiff), but here the present client is forbidden to talk to the prospective client.

Fragile First Amendment rights are often lost or prejudiced by delay. *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring); *Zwickler v. Koota,* 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444, 452 (1967); *Collin v. Smith,* 578 F.2d 1197, 1209 (7th Cir.), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978); *A Quaker Action Group v. Hickel,* 421 F.2d 1111, 1116 (D.C. Cir. 1969); Barnett, *The Puzzle of Prior Restraint,* 29 Stan.L.Rev. 539, 545 (1977). Courts have therefore been commendably willing to expedite proceedings involving First Amendment rights. *See New York Times Co. v. U. S., supra,* (Supreme Court decision issued 15 days after first TRO, 17 days after initial publication). Here, during the pendency of the conciliation offer, potential class members were substantially deprived[17] of the opportunity to confer with the attorneys presumably most knowledgeable, concerning whether they should accept Gulf's offer or look to the suit for redress. At the time they most needed counsel they were cut off from the attorneys most available until the time to make a choice had expired.[18]

The ban on communications is especially egregious both because this is a race discrimination case and because the counsel silenced without factual showing include those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that

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17. *See* n. 16 *supra.*

18. The impact of the restraint in this case is exacerbated by the inevitable delay associated with appellate litigation. The court en banc decides this case almost four years after the ban on communications was entered.

frequently arise in civil rights litigation," *NAACP v. Button,* 371 U.S. 415, 422, 83 S.Ct. 328, 332, 9 L.Ed.2d 405, 411-12 (1963), and engaged in "a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 n.14 (5th Cir. 1970).

Faced with the principle that one who violates an injunction may not raise unconstitutionality as a defense in contempt proceedings, appellees construe the order to permit a defense to contempt. The constitutionally protected status of the proposed communication or the communicator's good faith belief in that status, appellees argue, would constitute a defense to contempt. This qualified defense is not found within the order but was read into it by the panel majority. 596 F.2d at 1261.

Even if this construction is correct, the defense is so freighted with preconditions and uncertainties that it is little comfort to attorney or party. Under appellees' construction, the filing requirement is a prerequisite to assertion of constitutionality, or good faith belief in constitutionality, as a defense.[19] Indeed it is only by the vehicle of the filing requirement that appellees read into the order a defense not otherwise available in a contempt case.[20] The filing requirement itself chills expression. With respect to the individual class members, filing within five days a

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19. It is not contended that the act of filing is an absolute defense to contempt. There would be little purpose in entering an order with such a meaning.

20. Facially the filing requirement is nothing more than a means of notice to the court, unrelated to a defense of contempt. No one advances this interpretation, and we doubt it was intended.

"complete summary" of every oral communication about the case had by each class member with any of his black fellow employees, is a practical impossibility. Beyond that, knowledge of what may be constitutionally protected is not readily available to the usual employee. In a real sense, for the individual plaintiffs silence is the only alternative. An attorney will have the knowledge, and better means, to file reports with the court as required, but if he asserts that he is constitutionally entitled to talk with prospective clients, ask financial aid, or seek support from a group or the community, filing will be a substantial burden. An attorney claiming a constitutional right to talk with witnesses could find compliance well nigh impossible. Also, the filing requirement arguably runs afoul of the attorneys' work product rule of *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

The conditional defense is accompanied by a second chilling effect, the risk of trial on criminal contempt charges, with guilt or innocence possibly turning on whether one's assertion of constitutional protection has been made in "good faith." Moreover, the omissions and ambiguities of the order and possible differing constructions as to when, if at all, one is protected against contempt, accentuate the chilling effect.[21]

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21. For example, in addition to the general ban on communication, subparagrapn (a) of ¶ (2) expressly forbids solicitation. Prudent counsel very well may conclude that he cannot safely rely upon asserting constitutional protection in the face of this specific ban—if there is a "good faith" defense can counsel be in good faith if he does what he is expressly ordered not to do? As one commentator has noted:

> The proviso exempting constitutionally-protected communications does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule.

Note, 88 Harv. L. Rev. 1911, 1922 n.74 (1975). *See also Zarate v. Younglove,* 22 FEP Cases 1025, 1042 (C.D. Cal. 1980).

Most attorneys, faced with an order like the one before us,[22] would pursue the course chosen by counsel in this case and seek prior approval of the court before attempting to communicate with actual or potential class members. *See In re Halkin, supra,* 598 F.2d at 184 n. 15; *Goldblum v. National Broadcasting Corp.,* 584 F.2d 904, 907 (9th Cir. 1979).

Thus despite the filing provision, and the arguable "good faith" defense, the order has the "immediate and irreversible" effect of a prior restraint.

V. *The expression that is restrained is protected*

[8-10] Inquiry does not end with a determination that the order constitutes a prior restraint. The First Amendment is not absolute, and "the protection even as to previous restraint is not absolutely unlimited." *Near v. Minnesota, supra,* 283 U.S. at 716, 51 S.Ct. at 631, 75 L.Ed. at 1367; *accord, Times Film Corp. v. Chicago,* 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). Material unequivocally not protected by the Constitution may be the subject of a prior restraint if sufficient procedural safeguards are provided. This possibility does not exist in the present case because the communications proscribed by the order are constitutionally protected. Also, as discussed in Part VI, below, procedural safeguards are entirely lacking.

The restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients.

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22. The deficiencies are present in both the order and the suggested local rule. *See* n.6 *supra.*

The attorneys may not counsel a black employee free of any effort to solicit him. We have already noted, at the beginning of Part IV, the concern expressed by the Third Circuit in *Rodgers I*, 508 F.2d at 162-63, 165, over the constitutional problems raised by conditioning access to class action procedures upon prohibiting communications between counsel and potential class members.

In addition to the general restraint on attorneys there is a specific restriction against solicitation in subparagraph (a) of ¶ (2) of the order which forbids "solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action." *NAACP v. Button, supra,* and its progeny, *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagraph (a) proscribes constitutionally protected expression. In *Button,* the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[23] The solicitation was treated as a mode of political expression effectuated through group activity falling with the sphere of associational rights guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At

23. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

these meetings forms were circulated which authorized Legal Defense Fund attorneys "to represent the signers in legal proceedings to achieve desegregation." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*. Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of Legal Defense Fund lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the Legal Defense Fund lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case. *See also Great Western Cities, Inc. v. Binstein*, 476 F.Supp. 827 (N.D. Ill. 1979) (holding rule similar to district court's order constitutionally inapplicable to non-profit solicitation).

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra*. There the

Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of the litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the case, and the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's punishment of Primus for solicitation violated her First Amendment rights.[24] Counsel for plaintiffs here have submitted affidavits attesting to the fact that they neither received nor expect to receive from class members any compensation for their services.[25]

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24. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus,* sustained, against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain, he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication or illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida,* 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 482 Pa. 416, 393 A.2d 1178 (Pa. 1978).

25. Thus, subparagraph (b) of ¶ (2) of the order is not directly applicable. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar, supra,* the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right withn the protection of the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. Such activity is therefore deserving of constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Com-*

[11] Of course, the communications of individual plaintiffs, also proscribed by the order, are at least equally protected. *See Brotherhood of Railroad Trainmen v. Virginia State Bar, supra; Great Western Cities, Inc. v. Binstein, supra.*

The communications covered by the order are thus protected expressions which call into play the fully panoply of First Amendment safeguards against prior restraint.[26]

VI. *The prior restraint is not justified*

The order in this case is the essence of prior restraint—it places specific communications under the personal censorship of a judge. It is thus subject to the heavy presumption against its constitutionality and the rigid requirements imposed by the courts on those who seek to justify prior restraints. It must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. It must prevent direct, immediate and irreparable damage, and it must be the least restrictive means of doing so. Finally, it must comport with required procedural safe-

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mercial Corp., 77 F.R.D. 672, 673 (S.D. Ohio 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Pa. 1974), *modified*, 69 F.R.D. 117 (1975); *see generally* Note, *Solicitation By Attorneys: A Prediction and a Recommendation*, 16 Houston L. Rev. 452 (1979).

26. We do not discuss at length the plenary provisions of subparagraph (d) of ¶ (2) concerning statements tending to misrepresent. That section merely compounds the unconstitutionality exhibited by the preceding sections by adding vagueness and overbreadth to its defects. *See Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Zarate v. Younglove*, 22 FEP Cases 1025, 1942 (C.D. Cal. 1980); *U. S. v. Marcano Garcia*, 456 F.Supp. 1354 (D.P.R. 1978); Note, 88 Harv. L. Rev. 1911, 1922 n.74 (1975).

guards. The order at issue meets none of these requirements.

[12] There is a strong presumption against the constitutionality of any prior restraint, and the burden of justification is therefore heavier than that imposed in cases involving only subsequent restrictions on freedom of expression. *Southeastern Promotions, Ltd. v. Conrad, supra; New York Times Co. v. U. S., supra; Organization for a Better Austin v. Keefe, supra; Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Near v. Minnesota, supra; Penthouse Int'l Ltd. v. McAuliffe, supra; Universal Amusement Co. v. Vance,* 587 F.2d 159 (5th Cir.), *aff'd,* ____U.S.____, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

[13] In general, a prior restraint may be justified only if the expression sought to be restrained "surely [will] result in direct, immediate, and irreparable damage." *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 833 (5th Cir. 1979), *quoting New York Times Co. v. U. S., supra,* 403 U.S. at 730, 91 S.Ct. at 2149, 29 L.Ed.2d at 834. At least three justices may have rejected even that standard as overly lenient, without explicitly defining the appropriate test. *See New York Times Co. v. U. S., supra,* 403 U.S. at 732-33, 91 S.Ct. at 2150-51, 29 L.Ed.2d at 835 (White, J., joined by Stewart, J., concurring), and 403 U.S. at 740-41, 91 S.Ct. at 2154-55, 29 L.Ed.2d at 840 (Marshall, J., concurring).[27]

[14] To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition

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27. Justices Black and Douglas, adhering to their consistent rejection of any restriction on freedom of expression, also found the standard unacceptable. 403 U.S. at 714, 720, 91 S.Ct. at 2141, 2144, 29 L.Ed.2d at 825, 828.

against prior restraints," *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459; that is, "[the] publication [sought to be restrained] must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea. . . ." *New York Times Co. v. U. S., supra,* 403 U.S. at 726-27, 91 S.Ct. at 2148, 29 L.Ed.2d at 832 (Brennan, J., concurring); *see also Whitney v. California,* 274 U.S. 357, 377, 47 S. Ct. 641, 71 L.Ed. 1095, 1106) (Brandeis, J., concurring) ("Only an emergency can justify repression"). Indeed, one commentator has interpreted *New York Times v. U. S.* to hold that "there is a constitutional requirement that everything, or virtually everything, is entitled to be published at least once." Kalven, *supra,* 85 Harv. L. Rev. at 34.

[15-17] The order is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23. As the Third Circuit noted in *Rodgers I*: "[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163. It is obvious that in the conduct of trial the judge restrains expression and association in innumerable ways. But, "[w]hatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world." *Id.*

[18, 19] The Supreme Court has recently reaffirmed that even when the competing interest is a criminal defendant's right to a fair trial, "the barriers to prior restraint remain high and the presumption against its use

continues intact." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 570, 96 S.Ct. at 2808, 49 L.Ed.2d at 704. Other courts, including this one, have echoed this sentiment. "[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " *U. S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974). A lawyer's First Amendment right to comment about pending or imminent criminal litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 249, *quoting In re Oliver,* 452 F.2d 111 (7th Cir. 1971). Even in the context of a criminal defendant's right to a fair trial, then, prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L. Ed.2d at 697.

[20-22] If the exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior restraints, the interests of a civil litigant cannot do so. *See Hirschkop v. Snead, supra,* 594 F.2d at 373. The "interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." *Rodgers I, supra,* 508 F.2d at 163. Thus, the general presumption against prior restraints is not mitigated by a claim that the fair and orderly administration of justice is at stake.[28]

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28. We must distinguish two types of cases as only peripherally relevant to the inquiry at hand. *Craig v. Harney,* 331 U.S. 367, 67

[23-28] Nor does Rule 23, as a specific aspect of the administration of justice, create an exception to the principles governing prior restraints.[29] *See Rodgers v. U. S. Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) (*Rodgers*) (suggesting, in context of class action, that test is "clear and present danger or a reasonable likelihood of a serious and imminent threat to the administration of justice"). The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in

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S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and their progeny limited the circumstances under which courts may impose contempt sanctions for free expression that is subsequently deemed prejudicial to the administration of justice. Because the contempt in those cases was not based on violation of an explicit order, however, the cases "deal with problems substantially different from those raised by prior restraint." *Nebraska Press Ass'n v. Stuart*, *supra*, 427 U.S. at 557 n.5, 96 S.Ct. at 2802, 49 L.Ed.2d at 696 n.5; *see also Rodgers v. U. S. Steel Corp.*, 536 F.2d 1001, 1008 n.15 (3d Cir. 1976) (*Rodgers II*); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 Stan. L. Rev. 431, 472 (1977). Thus, the *Manual's* conclusion that *Craig* and *Bridges* authorize the suggested order, Part 1, § 1.41 n.33 (1977 ed.), is mistaken insofar as the order is a prior restraint and governed by a more stringent standard. *See* Wilson, *Control of Class Action Abuses Through Regulation of Communications*, *4 Class Action Reports* 632, 634 (1975).

We also find *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), and its antecedents inapposite. We are dealing here not with the right of reporters to gather information but with the right of individuals to disseminate it. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978); *U. S. v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). Protecting secrecy by excluding the press is not to be equated with preventing publication. *See* Sack, principle and Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 411, 428 (1977); Stevens, *Some Thoughts About A General Rule*, 21 Ariz. L. Rev. 599 (1979).

29. The district court never certified a class in this case. Arguably a court may have broader power over an actual class action than a putative class action, but the presence or absence of certification does not materially affect the considerations that we view as controlling.

other contexts. Subdivision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further "the fair and efficient conduct of the action. . . ." Advisory Committee Notes to Rule 23. Like the common law contempt power at issue in *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), the court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights. Prior restraints are no less suspect in a statutory setting than they are in a constitutional context. *Allen v. Monger,* 583 F.2d 438, 442 (9th Cir. 1978), *pet. for cert. filed sub nom., Brown v. Allen,* ____U.S.____, 100 S.Ct. 1003, 62 L.Ed. 2d 745 (1978). We cannot interpret Rule 23 as authorizing prior restraints without rewriting the First Amendment and the gloss put upon it by the Supreme Court. This, of course, we are not at liberty to do. Moreover, the Rules Enabling Act, 28 U.S.C. § 2072, explicitly provides that the Rules "shall not abridge, enlarge or modify any substantive right." Finally, much of the communication prohibited by the order is both constitutionally protected and consistent with the purposes of the class action. *See Coles v. Marsh,* 560 F.2d 186, 189 (3d Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977)); n. 30 *infra.*

[29, 30] An exception to the constitutional principles limiting prior restraints cannot be constructed on the foundation of asserted potential abuses in class actions generally. In the first place, the hypothesis that abuses occur with such frequency and impact that prophylactic judicial intervention is required must be examined with the same scrutiny as other factual hypotheses. Neither the Constitution nor the judge's duty of constitutional fact finding is subsumed by the application of the pejorative word "abuse." Not everything that tends to make a class action less convenient than ideal, or more difficult to manage, is an "abuse." The same is true of such activities as solicitation of clients, or funds, or community support, that may be constitutionally protected but, at least to some, may appear only marginally ethical.[30] The frequency and the effect of genuine abuses in class actions in general are not revealed by any empirical data made known to us, and judges may differ widely in their individual assessments. The *Manual* expressly recognizes that "abuse" of the class action is a rare occurrence, an exception and not the rule:

> It must be noted, however, that, generally, the experience of the courts in class actions has been fa-

30. In *Coles v. Marsh*, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), a race/sex discrimination in employment case, the basis for an order banning communication by plaintiff and her lawyer was plaintiff's deposition in which she indicated that she had contacted and would continue to contact potential class members with the hope of interesting them in participating in the suit and had contacted the NAACP to enlist its support, financial and otherwise, and proposed to contact other organizations for the same purpose. The Third Circuit rejected the argument that these were abuses and held they effectuated the purposes of Rule 23 by encouraging participation in plaintiff's race/sex discrimination claim and that the district court had no power to restrain them.

> vorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order.

Manual, Part I, § 1.41, p. 31 (1977 ed.). Its rationale is that it is desirable to anticipate and prevent these infrequent occurrences before they happen.[31]

In any event, the potential abuse rationale is at odds with the requirement that a prior restraint is only justified in exceptional circumstances and by a showing of direct, immediate and irreparable harm. Whether such a showing can be made may be affected by a host of factors: the occurrence of misconduct or the threat of it, the composition and size of the class, the nature of the claim, the historical policies of the district court in administering class actions, the identity, experience and standards of the lawyers, the mores of the bar, the necessity for discovery and many others. None of the four major potential abuses listed by the *Manual* presents any direct or immediate threat to the litigation in this case. Solicitation of clients is protected here under *Button* and *Primus. See* pp. 471-473, *supra.* The possibility of solicitation of funds is controverted by affidavits. *See* n. 25 *supra.* Solicitation of opt-out requests is not relevant to this Rule 23(b)(2) case. Finally, nothing justifies any inference in this case that communications are likely to "misrepresent the status,

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31. *Compare Bulletin of Recent Developments, Manual for Complex Litigation,* Aug. 25, 1978, p. 7:

> Experience continues to teach that, because of the vast and ever-present potential for abuse of the class action through unauthorized communications in many unpredictable forms, it is dangerous to await the occurrence of an abuse before trying to correct it.

purposes and effects of the . . . action and of . . . [the] Court orders therein."

[31] There are other prerequisites to justification of a prior restraint. It must not sweep too broadly. Rather it "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *CBS, Inc. v. Young,* 522 F.2d 234, 238 (6th Cir. 1975); *see also Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). There are alternatives to a total ban on communications. *See* n. 13 *supra; Developments in the Law—Class Actions,* 89 Harv. L. Rev. 1318, 1600-1604 (1976); Wilson, *Control of Class Action Abuses Through Regulation of Communications,* 4 Class Action Reports 632 (1975). The order before us suppresses essentially everything, and one seeking to exercise his right to speech or association must petition the court.[32] No showing has been made, or even offered, that reasonable alternatives with lesser impact are unavailable.

[32] Finally, the restraint "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459. There are none here: no evidence, no way to test the potential abuse premise, no findings of particular abuses present or threatened, and no conclusions of law (except as to the desirability of conciliation). Obviously, there never can be procedural safeguards if by rule or order a whole-

32. It is obvious that overbreadth is inevitable under a system by which plenary restraints are imposed automatically by rule or order in every actual or potential class action.

sale restraint is directed in every case and those restrained are able to escape its impact only by showing good cause to be excepted or risking the vagaries of an arguable good faith defense.

[33] The remaining justification for the order is the district judge's reference to his obligations to encourage private settlement of Title VII charges. *U. S. v. Allegheny-Ludlum Industries,* 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). The notice sent by the clerk gave judicial recognition to the conciliation agreement and extended the time during which employees could accept Gulf's offer, while at the same time giving notice of the pendency of this suit. But, as we noted in *Allegheny-Ludlum,*

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 n. 26, *quoting Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 461, 95 S.Ct. 1716, 1720, 44 L. Ed.2d 295, 302 (1975). In *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), *vacated on other grounds,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice.

[34, 35] We therefore hold that the district court's order restricting communication by parties and their counsel with actual and potential class members is an unconstitutional prior restraint.[33] This holding makes it un-

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33. While we hold that the order is a prior restraint, the unconstitutionality of the order does not rest on that ground alone. Even under the more relaxed analysis accorded subsequent restraints the order fails to pass constitutional muster. Much of the order is vague and overbroad. *See* n.26 *supra; see also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976). Even a legitimate governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960); *see also Village of Schaumberg v. Citizens for a Better Environment*, ____U.S.____, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (restriction invalid if purpose "could be sufficiently served by measures less destructive of First Amendment interests"). Moreover, the circumstances under which the order was issued do not meet any of the previously articulated standards governing restriction of constitutionally protected expression. *See, e.g., Villiage of Schaumberg v. Citizens for a Better Environment, supra* (regulation "intimately related to substantial governmental interests"); *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech "intended to produce, and likely to produce, *imminent* disorder"); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (speech "brigaded with action") (Douglas, J., concurring); *Bridges v. California*, 314 U.S. 252, 62

necessary for us to consider whether the order violates the First Amendment associational rights of either the individual plaintiffs or their attorneys. *See Rodgers I, supra,* 508 F.2d at 163; *Great Western Cities, Inc. v. Binstein, supra,* 476 F.Supp. at 834; *cf. NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958) (requiring NAACP to submit membership lists infringes associational rights); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (requiring list of organizations to which individual belongs or contributes infringes associational rights); *Robinson v. Reed,* 566 F.2d 911 (5th Cir. 1978) (requiring disclosure of facts about beliefs or associations infringes rights of privacy and association).[34]

S.Ct. 190, 86 L.Ed. 192 (1941) ("clear and present danger"); *Chicago Council of Lawyers v. Bauer, supra* (speech must pose " 'serious and imminent threat' of interference with the fair administration of justice").

34. We have also pretermitted discussion of the order's limitation on access to and dissemination of discovery materials as possibly implicating both the First Amendment, *In re Halkin, supra,* 598 F.2d at 188-89, and the due process clause of the Fifth Amendment, *Goulaman v. Seligman & Latz of Houston, Inc.,* 82 F.R.D. 727, 728 (S.D. Tex. 1979). *See Waldo v. Lakeshore Estates, Inc.,* 433 F.Supp. 782, 787 (E.D. La. 1977); Note, 88 Harv. L. Rev. 1911, 1919 (1975). The *Manual* itself notes the risk that barring contact with class member-witnesses may violate due process:

> In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.

Manual, Part I, § 1.41, p. 29 (1977, carried forward from 1973 ed.).

Additionally, we have not considered whether the order may violate the Fifth Amendment privilege against self-incrimination by compelling those who may have disobeyed it to produce testimonial evidence describing their transgressions. *See U. S. v. White,* 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); *U. S. v. Authement,* 607 F.2d 1129 (5th Cir. 1979).

VII. *The order violates Rule 23*

[36] Because we hold that the order violates the First Amendment, it follows that it cannot be an "appropriate order" under Rule 23(d) of the Federal Rules of Civil Procedure.[35]

The order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members is VACATED, the judgment of the district court is REVERSED and the case is REMANDED to the district court for proceedings consistent with this opinion.

TJOFLAT, Circuit Judge, with whom JOHN R. BROWN, GEE, HENDERSON and REAVLEY, Circuit Judges, join, specially concurring:

I concur only in the result because I believe the majority's analysis inexcusably ignores the principle that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine,* 415 U.S. 528, 547, 94 S. Ct. 1372, 1384, 39 L.Ed.2d 577 (1974). The non-constitutional ground that would dispose of the case is that the district court abused its discretion when, without making any findings of fact, it entered the order restricting the parties' and counsel's communications with actual or potential class members who were not formal parties.

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35. Other circuits have reached conflicting conclusions as to the propriety under Rule 23 of similar orders. *Compare Rodgers I, supra with In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1138 n.57 (7th Cir.), *cert. denied,* 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

The majority's analysis begins with an examination of the "basis" of the order. The opinion immediately rejects the notion that the district court's order could have rested on Gulf Oil Company's unsworn allegations that one of the plaintiffs' attorneys had improperly communicated with actual or potential class members who were not formal parties: "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did. . . ." *Ante* at 466. Even if the district court had based its order on a conclusion that Gulf's charges were true, the opinion reasons, "such a conclusion would have been procedurally improper and without evidentiary support." *Id.* Therefore, the majority "presumes" that the district court must have based its order "upon the rationale of the [*Manual for Complex Litigation*] that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual.*" *Id.*

Logic and sound jurisprudence insist that the majority next consider the procedural propriety and evidentiary support of an order founded solely on the rationale and model order of the *Manual.* Instead, the opinion inexplicably leaps to the question of the constitutionality of the *Manual's* suggested order and holds that the order is an unconstitutional prior restraint. Since the district court's order was based entirely on the model order and policy considerations set out in the *Manual,* it follows that the district court's order is unconstitutional as well. The opinion then belatedly and, in light of the disposition of the constitutional issue, somewhat gratuitously turns to the question of procedural propriety, concluding that an un-

constitutional order cannot be "appropriate" within the meaning of Fed. R. Civ. P. 23(d).

In my view, the federal policy of avoiding unnecessary constitutional rulings requires that this court reserve consideration of the first amendment problems that the district court's order may raise and address first the question of the district court's authority to issue the order. As Judge Godbold persuasively demonstrates in his dissenting opinion to the panel decision, the district court misused its discretion in entering the order in this case. *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1262-76, *vacated*, 604 F. 2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part). Therefore, we need not reach the constitutional question.

Rule 23(d) permits district courts, in conducting class actions, to "make appropriate orders: . . . (3) imposing conditions on the representative parties . . ." Although this provision gives a district court "extensive power" to manage a class action, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 at 192 (1972), the orders that a court issues pursuant to the rule are certainly subject to review for abuse of discretion. *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088, 1096 (5th Cir. 1977). As this court observed in *Nissan*, "Appellate review is necessary to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision." *Id.* The reviewability of rule 23(d) orders is also implicit in the language of the rule. The district court is limited to issuing those orders that are "appropriate." If this constraining language is to be effectual, rule 23(d) orders must be reviewable by the courts of appeals.

Since rule 23(d) orders are reviewable, it follows that such orders must be based on findings of fact:

> [I]ssuance of an order . . . without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978) (citations omitted) (vacating and remanding district court's order denying attorney fees to successful civil rights plaintiff). *Cf.* Fed. R. Civ. P. 52(a) ("in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action").

The general principle restated by the *Sargeant* court applies to any court order that is based on the court's assessment of conflicting evidence or policy considerations. I see no reason to suppose that the principle is not pertinent here. A request for a rule 23(d) order restricting communications between counsel and potential or actual class plaintiffs is not essentially different from an ordinary petition for a preliminary injunction.[1] Communications

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1. Judge Godbold makes this point nicely in his panel dissent:
> The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this

like those prohibited by the district court's order certainly create a potential for abuse, but they may also be beneficial. For example, such communications, "in many instances serve to effectuate the 'purposes of Rule 23 by encouraging common participation in [a lawsuit].'" *Bernard v. Gulf Oil Co.*, 596 F.2d at 1268 (Godbold, J., dissenting) (*quoting Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). Just as if it had been faced with a request for an injunction, the district court should have ruled on Gulf's motion for an order restricting communications only after weighing, on the record, the potential for abuse that would be generated by permitting free communications between the parties and class members against the benefits flowing from such communications. As in the ordinary case involving a request for a temporary injunction, the burden of proof would be on the movant—here, Gulf. To meet its burden of proof, Gulf would have to make "a factual showing . . . that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened." *Bernard v. Gulf Oil Co.*, 596 F.2d at 1267 (Godbold, J., dissenting).

As the majority opinion notes, the district court entered the order in this case without making any findings of fact. The only "evidence" Gulf presented that the restricted communications would lead to abuses was unsworn allegations of misconduct on the part of one of the class at-

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court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

Bernard v. Gulf Oil Co., 596 F.2d 1249, 1270, *vacated* 604 F.2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

torneys, and the accused attorney denied the charge under oath. Even if the district court had explicitly based its order on Gulf's charges, I would find that entry of the order was an abuse of discretion on the ground that Gulf had not conceivably met its burden of proof. It is still more clear that the Court abused its discretion by issuing the order without elucidating *any* factors that contributed to its decision.

The absence of any findings of fact leads the majority to conclude that the district court founded its order on the *Manual for Complex Litigation's* model order and rationale. *Ante* at 466. In my view, the record does not adequately support this conclusion. The district court cited the *Manual* not to justify the imposition of the order, but to defend the order from plaintiffs' First Amendment attack: "[T]his order comports with the requisites set out in the *Manual for Complex Litigation,* Section 1.41 p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communications when the substance of such communication is filed with the Court." *Record* at 128e. The court's mere mentioning of the *Manual* obviously does not constitute the deliberate articulation of rationale that is necessary if there is to be any possibility of meaningful review.

Moreover, even if the court had relied explicitly on the rationale of the *Manual*'s model order to support the order, the court's entry of the order would have been procedurally improper. The *Manual* is not a source of authority with the force of a statute or rule of civil procedure. Therefore, a trial court could not evade its responsibility to make findings of fact on the record simply by relying on the *Manual.* In other words, it would have been an

abuse of discretion for the court to have adopted the *Manual's* apparent conclusion that a court order restricting communications is appropriate in *every* class action. This is because the validity of the *Manual's* analysis and conclusion is not the sort of undisputed knowledge that would justify what would be, in effect, judicial notice. Since there is reason to believe that communications between counsel and actual and potential class members are not *always* abusive of the class action device, "[t]he *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case." *Bernard v. Gulf Oil Co.*, 596 F.2d at 1268 (Godbold, J., dissenting).[2]

For the reasons I have stated, I would hold that the district court abused its discretion when it entered the order restricting communications. I think this conclusion is unavoidable, whether the order is viewed as based upon the trial judge's assessment of the particular case before him or as based on the *Manual's* general discussion of potential abuses. Therefore, I must regard the majority's

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2. Of course, there are some communications that a court may restrict, in the interests of the administration of justice, without making findings or even considering the facts of the particular case. For example, a trial judge may certainly instruct members of the jury not to discuss a case with anyone while the trial is in progress. The crucial difference between this example and the case before us is that, first amendment considerations aside, there could be no purpose served by permitting the jury to discuss a case during the trial, while it is not open to question that such communications would always pose an imminent threat to the fair administration of justice. On the other hand, communications like those enjoined in the present case might actually benefit the judicial process through serving the rule 23 policy of encouraging common participation in a lawsuit. *See* p. 464, *supra*.

first amendment analysis as a needless excursion into a difficult and little-explored area of constitutional law.[3]

FAY, Circuit Judge, with whom COLEMAN, Chief Judge, and RONEY, Circuit Judge, join, special concurring statement:

The majority of the *en banc* court adopts parts I, II and III of the panel opinion found at 596 F.2d 1249. As to the order dealing with communications by named parties and their counsel with any actual or potential class member not a formal party, I adopt parts I and II of Judge Godbold's original opinion, concurring in part and dissenting in part from the panel majority. 596 F.2d at 1262. In my opinion the order was "inappropriate" under Rule 23 and an abuse of discretion in this case. So concluding, I would not reach the constitutional issues.

JAMES C. HILL, Circuit Judge, dissenting:

I cannot agree that an order restricting the conduct of attorneys and their clients in connection with an ongoing lawsuit should be scrutinized under the First Amendment. I believe that during the pendency of a lawsuit the judge may restrict speech and conduct which in a different setting would be protected by the First Amendment. A

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3. Although the majority concludes that the order in this case was an unconstitutional prior restraint, the opinion certainly does not preclude a district court's entering an order similar to the *Manual's* model order after making a proper finding of facts. The majority condemns only restrictions of communications "constructed on the foundation of asserted potential abuses in class actions generally," *ante* at 475, and admits that a "prior restraint" may be justified "by a showing of direct, immediate and irreparable harm." *Ante* at 476.

precedent which requires that such orders be scrutinized under the First Amendment is a dangerous one with the potential for consequences not intended by the majority.

The propriety of this order should be tested only under Rule 23's appropriateness standard. Under the facts of this case, I would hold that the order was appropriate.

APPENDIX B

Memorandum Decision of the United States Court of Appeals Granting a Rehearing *En Banc*, Dated September 27, 1979

Wesley P. BERNARD, et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY, et al.,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

Sept. 27, 1979.

Appeal from United States District Court, Eastern District of Texas; Joe J. Fisher, District Judge.

* * *

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC.

(Opinion June 15, 1979, 5 Cir., 1979,
596 F.2d 1249).

Before BROWN, Chief Judge, COLEMAN, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, JOHNSON, GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON and RANDALL, Circuit Judges.*

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* Judges Goldberg and Ainsworth have recused themselves and did not participate in this decision.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

Panel Opinion of the United States Court of Appeals for the Fifth Circuit, Dated June 15, 1979

Wesley P. BERNARD, et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY, et al.,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

June 15, 1979.

* * *

Appeal from the United States District Court
For the Eastern District of Texas.

Before THORNBERRY, GODBOLD and HILL, Circuit Judges.

THORNBERRY, Circuit Judge:

Plaintiffs-appellants in this case are present or retired employees of defendant Gulf and claim that Gulf and the defendant unions have discriminated against plaintiffs and similarly situated black employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court entered an order prohibiting the parties from communicating with class members and later granted defendants' motions for summary judgment.

Plaintiffs Bernard, Brown, and Johnson filed charges of discrimination with the EEOC in 1967 against Gulf and the local union.[1] The EEOC served copies of the charge on defendants in August, 1967, and issued a finding of reasonable cause in August, 1968. The EEOC actively pursued conciliation efforts with defendants until February, 1975, at which time it sent plaintiffs a notice stating that defendants did not wish to entertain conciliation discussions and advising plaintiffs that they could request a "Notice of Right to Sue" letter at any time.[2] The EEOC continued conciliation efforts on the basis of a Commissioner's charge filed in September 1967, which raised the same issues charged by plaintiffs. These efforts resulted

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1. Bernard also filed charges against the international union in 1976, but the EEOC dismissed this charge as untimely. Apparently, this was the only charge any of the plaintiffs filed against the international union. Although these facts may have some relevance to the merits of the action or scope of relief against the international union, the parties did not discuss that possibility before this court. Therefore, although the district court may decide differently after further examination on remand, on this appeal we will discuss the issues raised as if they were equally applicable to all defendants.

2. These first letters stated:
On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company—U. S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

It is advisable that, fi you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

in a conciliation agreement between the EEOC and Gulf in April, 1976. Plaintiffs filed this suit in May, 1976, and requested the Right-to-Sue letters from the EEOC. The EEOC issued the letters to Bernard and Brown in June,[3] and plaintiffs amended their complaint to reflect this fact in July, 1976.

Soon after they filed the complaint, plaintiffs' attorneys appeared at a meeting of Gulf employees, during which they discussed this case. As a result of this meeting, Gulf requested the court to enter an order restricting the parties' or counsels' communication with class members. Gulf accompanied this request with an unsworn assertion that plaintiffs' attorneys had told the employees at the meeting it would be against their interest to accept the back pay award offered pursuant to the conciliation agreement. Plaintiffs' attorneys adamantly denied that they had urged the employees to reject the conciliation agreement. The court granted Gulf's motion without making any findings[4] Defendants then moved to dismiss the complaint. In November, 1976, the court ordered that the motion

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3. The Right-to-Sue letters stated:

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

4. This order is set out in footnote 9, *infra*.

be treated as a motion for summary judgment, and granted summary judgment for defendants in January, 1977. Plaintiffs raise four issues on this appeal.

I.

[1] The district judge dismissed plaintiffs' Title VII claim because plaintiffs failed to file suit within 90 days of receiving the first letter, which stated that conciliation efforts had failed and that plaintiffs could request a Notice-of-Right-to-Sue letter. The judge held "that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC." Since the trial court opinion in this case, however, this court has held differently. In *Zambuto v. American Tel. & Tel. Co.*, 544 F.2d 1333 (5 Cir. 1977), a panel of this circuit noted that the statute imposing the 90 day limitation could be read to begin the 90 day period on receipt of a notice that the EEOC has either failed to file a civil action or has not arrived at a conciliation agreement. That court stated, however, that the limitations period does not begin to run until the EEOC has notified the claimant "of both the failure of conciliation and the EEOC's decision not to sue in order to indicate clearly that the administrative process has been completed." *Id.* at 1335. *Accord Turner v. Texas Instruments, Inc.*, 556 F.2d 1349 (5 Cir. 1977); *Page v. U. S. Indus., Inc.*, 556 F.2d 346 (5 Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). Furthermore, the *Zambuto* panel held that the final paragraph of the initial letter informed Mrs. Zambuto that "the EEOC was awaiting [her] request for issuance of a right-to-sue letter. Implicit in this latter statement is the assurance that the 90 day period would not commence until this letter was requested and dis-

patched. Because this paragraph declared that further administrative action was contemplated by EEOC, it failed to furnish Mrs. Zambuto (or AT&T) with the form of notice required under § 2000e-5(f)(1) to start the 90 day period for filing suit." 544 F.2d at 1335. Because the two-letter procedure allowed the claimant to postpone filing suit, the *Zambuto* panel declared the procedure invalid. Because the use and wording of the two letters was "patently misleading," however, that panel made its ruling prospective only.

[2] At oral argument, defendants conceded that the present case is directly controlled by *Zambuto* and the cases following it. Plaintiffs filed suit before the *Zambuto* decision, and the letters plaintiffs received are indistinguishable from those involved in *Zambuto, Page,* and *Turner.* As in *Turner* and *Page,* the first letter plaintiffs received informed them only that conciliation efforts had failed; it did not indicate that the EEOC had decided not to sue. Also, as in *Page* and *Zambuto,* the concluding paragraph of the first letter assured plaintiffs that the 90 day period would not commence until plaintiffs received the second letter. Because the letters to the plaintiffs in this case were as "patently misleading" as those in prior cases, the 90 day period for filing suit did not begin until receipt of the second letter. Plaintiffs filed suit within this period. Therefore, the district court erred in dismissing the individual Title VII claims of Bernard and Brown. Also, because the claims of these class representatives are properly before the court, the district court erred in dismissing the claass claims and the claims of the other named plaintiffs who did not file a complaint with the EEOC. *Wheeler v. American Home Prod.*, 563 F.2d 1233

(5 Cir. 1977); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5 Cir. 1968).

II.

The district judge also granted summary judgment in favor of defendants on plaintiffs' § 1981 claim. The trial judge found that plaintiffs' complaint alleged only "the identical pattern of discrimination which was the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated." In addition, the court found as a fact that there were no continuing acts of discrimination.

[3-5] Defendants make two arguments in support of this holding. First, they assert that the trial court properly granted summary judgment in their favor because plaintiffs failed to respond properly to defendants' summary judgment motion. Plaintiffs assert that defendants have discriminated in the past and presently continue to discriminate against blacks in hiring, assignment, promotion, training, recruiting, discipline, and discharge. Defendants argue that "appellants wholly failed to offer factual support for their assertions." Defendants-appellees brief at 18. Defendants misunderstand the summary judgment practice. Under Fed. R. Civ. P. 56, the moving party has the initial burden of proving that there is no genuine issue of material fact. If the movant wishes to dispute the allegations of the complaint, he must do so through affidavits, documents, or other evidence. Unless and until the movant initially provides factual support for the summary judgment motion, the opposing party has no duty to respond to the motion or to present opposing evidence. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210 (5 Cir. 1976). In the present case, defendants presented a great

number of affidavits with their summary judgment motion, but in none of the affidavits did defendants deny that they are discriminating against blacks. Therefore, the trial judge's ruling that there were no instances of continuing discrimination was unsupported by the summary judgment record. Defendants, as the parties requesting summary judgment, failed to meet their burden of showing the absence of any material issue of fact.

[6-8] Defendants also argue that even if the facts plaintiffs allege are true, we must dismiss plaintiffs' § 1981 claim. In support of this contention, defendants argue primarily that the applicable statute of limitations is that provided by Tex. Rev. Civ. Stat. Ann. art. 5526, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5 Cir. 1974), and that under Texas law, the statute of limitations begins to run when the elements necessary for the cause of action first coalesce, regardless of whether defendants later commit other acts of the same nature. Under defendants' theory, the statute of limitations would have expired on plaintiffs' claim two years after defendants began discriminating against blacks, even if defendants continued such discrimination to the time plaintiffs filed this action. This argument is frivolous. Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the *last* date on which defendants improperly harmed plaintiffs. Furthermore, plaintiffs may collect damages for any wrongful acts defendants committed within the limitations period. *E.g.*, *Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 (6 Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 77, 478 F.2d 979, 987 (1973); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5 Cir. 1973); *Alexander & Polley Const. Co. v. Spain*,

477 S.W.2d 301 (Tex. Civ. App.—Tyler 1972 no writ); *Goldman v. Ramsay,* 62 S.W.2d 176 (Tex. Civ. App.—Texarkana 1933 error dism'd). Defendants' reliance on *Kittrell v. City of Rockwall,* 526 F.2d 715 (5 Cir.), *cert. denied,* 426 U.S. 925, 96 S.Ct. 2636, 49 L.Ed.2d 379 (1976), is unfounded. That case turned on the rule, peculiar to trespass cases, that the statute of limitations begins to run on the date when the trespassers first entered the land, even if they continue to use the land after that date. *Baker v. City of Fort Worth,* 146 Tex. 600, 210 S.W.2d 564 (1948). This rule cannot be applied when defendants, as in this case, continue to violate plaintiffs' rights with new and distinct actions.

[9] Therefore, the district judge erred in holding that the statute of limitations totally barred plaintiffs' § 1981 claim. Plaintiffs' cause of action and any recovery they may receive, however, must be limited to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter.

III.

In addition to holding that statutes of limitations barred plaintiffs' claims, the district court "acknowledge[d] a most compelling argument for the equitable doctrine of laches in this particular case. . . ." Because we disagree with the court's ruling on the legal defenses, we find it necessary to discuss this alternative theory in support of the judgment below. *Lowe v. Pate Stevedoring Co.,* 558 F.2d 769, 770 n.2 (5 Cir. 1977).

[10] In *Franks v. Bowman Transp. Co.,* 495 F.2d 398, 406 (5 Cir. 1974), *rev'd on other grds,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), this court held

that the doctrine of laches is applicable to Title VII and § 1981 actions brought by private plaintiffs, even if the legal limitations periods have not run. To apply laches in a particular case, the court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced defendants. *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers,* 549 F.2d 1021, 1026 (5 Cir.), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). We conclude that the evidence before the court on this summary judgment motion does not allow a finding that either of these elements exists.[5] Defendants argue that plaintiffs were aware of their cause of action at least as early as 1967 when they filed their initial charges against defendants with the EEOC. They also assert that plaintiffs could have requested a Notice of Right to Sue from the EEOC and filed a private action in 1970. 35 Fed. Reg. 10006 (June 18, 1970) (currently at 29 C.F.R. 1601.256 (1977)). Defendants therefore argue that plaintiffs' failure to file a complaint with the district court until 1976 "shows conclusively that they have slept on their rights." Defendants-appellees' brief at 28. The only justification plaintiffs offer for this nine-year delay in filing suit is their asserted right to await the completion of the EEOC administrative process. The issue before us, therefore, is whether plain-

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5. Which party has the burden of proof on the issues of laches is somewhat unclear. *See* G. Gilmore & C. Black, The Law of Admiralty 771-76 (2d ed. 1975); *Law v. Royal Palm Beach Colony,* 578 F.2d 98, 101 (5 Cir. 1978); *Wheat v. Hall,* 535 F.2d 874, 876 (5 Cir. 1976). The determination is complicated by the fact that the question has arisen most often in admiralty cases, which may not be entirely controlling in the present case. We find it unnecessary to decide this issue, however, because the facts as presented on this summary judgment motion, without more, do not allow a finding of laches.

tiffs' failure to file a private action until after the termination of the EEOC's active, continuing administrative process is unreasonable.

The Supreme Court in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), discussed a similar issue. The employer-defendant in *Occidental Life* claimed that either federal or state statutes barred the EEOC from initiating suit more than three years after a claimant had filed a charge with the EEOC. In language particularly applicable to the present case, the Court indicated: "When Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities." *Id.*, 97 S.Ct. at 2455. A legislative analysis of the 1972 amendments to Title VII is similar:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's right to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

118 Cong. Rec. 7565 (1972).

[11, 12] These statements clearly indicate that the private remedy allowed by 42 U.S.C. § 2000e-5(f)(1) is only an alternative method for a plaintiff to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forgo this alternative and electing instead the legislatively and judicially favored method of relying on

the administrative processes of the EEOC.[6] We therefore hold that plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches.

[13] Plaintiffs' § 1981 claim is in a slightly different posture. We have already decided that the state statute of limitations prevents plaintiffs from asserting claims arising more than two years before the filing of the complaint. Therefore, any delay occurring before that period is irrelevant to the § 1981 claim. Defendants have not alleged that plaintiffs delayed inexcusably in asserting the claims arising within those two years. Therefore, it is unnecessary for us to consider whether laches could be invoked to bar those claims arising within the legal limitations period.

[14, 15] We also conclude that, on the evidence presented, any prejudice suffered by defendants was caused not by plaintiffs' delay but by defendants' own actions. In the only affidavit supporting this element of defendants' summary judgment motion, the personnel director of Gulf indicated that since the date when plaintiffs allege the violations began, defendant Gulf has made several personnel changes, a number of management personnel have retired, and two personnel managers have deceased. These statements are insufficient grounds on which to base a finding of prejudice. The fact that there have been per-

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6. As stated in *Sangster v. United Air Lines*, 438 F.Supp. 1221 (N.D. Cal. 1977):

> Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

sonnel changes or that employees have retired is irrelevant unless those employees are unavailable. *Akers v. State Marine Lines, Inc.*, 344 F.2d 217, 221 (5 Cir. 1965).

[16, 17] The affidavit does indicate that two former personnel managers have died and that those employees' knowledge is irreplaceable. Gulf asserts the live testimony of these employees is necessary, however, only because it has destroyed the written records of the personnel decisions made from 1965 through 1974. Defendants argue that they cannot now adequately defend against plaintiffs' charges without reference to these destroyed records. The EEOC informed defendants of the charges in 1967. Pursuant to its normal document retention plan, Gulf retained documents for only four years. Thus, Gulf did not destroy the documents relevant to the claims arising in 1965 until 1969, two years after Gulf learned of the charges. A party cannot assert the defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim. *American Marine Corp. v. Citizens Cas. Co.*, 447 F.2d 1328 (5 Cir. 1971).[7] This rule is of even greater

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7. The concluding statements of the Supreme Court in *Occidental Life* are again relevant:

> The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that

validity in this case than in most. Since 1966, the EEOC has maintained a regulation prohibiting those charged with Title VII violations from destroying records relevant to the charge. 31 Fed. Reg. 2833 (Feb. 17, 1966) (currently at 29 C.F.R. 1602.14 (1977)). Therefore, defendants' argument that plaintiffs' delay prejudiced defendants is without merit. Insofar as defendants have been prejudiced, the evidence before the court shows that defendants' own negligence and disregard of EEOC regulations caused the prejudice.[8] We conclude that the present facts do not allow findings of either unreasonable delay or prejudice. Therefore the doctrine of laches is inapplicable.

IV.

[18] Because we are remanding this case for further action, it is necessary that we consider the propriety of an order the district judge entered restricting the parties' communication with the members of the putative class. Judge Steger, in Chief Judge Fisher's absence, originally entered an order generally prohibiting all communication without exception. Chief Judge Fisher later modified the order. It is of this later order that plaintiffs complain on appeal. The modified order was explicitly modeled on those suggested by the Federal Judicial Center in the

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the charged party be promptly notified when a determination of reasonable cause has been made, 29 CFR § 1601.19b(b), and when the EEOC has terminated its efforts to conciliate a dispute, *id.*, §§ 1601.23, 1601.25.

97 S.Ct. at 2458.

8. Defendants admit that plaintiffs' § 1981 claims are nearly identical to their Title VII claims. Defendants could therefore disprove the claims with the same evidence. Since the EEOC regulations required defendants to maintain all records relevant to the Title VII claims, defendants could not have been prejudiced with respect to either Title VII or § 1981.

Manual for Complex Litigation, Part 2, § 1.41 (1977).[9]

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9. The order provided:
IT IS ORDERED:
(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;
(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:
In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P., and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.
This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.
If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

Plaintiffs argue that the order was improper for several

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U. S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix 1;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

reasons. First, they assert that it is inconsistent with the policies of Rule 23 of the Federal Rules of Civil Procedure and therefore beyond the powers of the district court. We reject that argument and hold that the order was a permissible exercise of the trial court's discretionary power in controlling a class action.

As one noted treatise states:

> Because class actions tend to be extremely complicated and protracted, their management and disposition frequently require the exercise of considerable judicial control and ingenuity in the framing of orders relating to various aspects of the case. Rule 23 (d) provides the trial court with extensive discretion in achieving this objective and offers some guidance as to the types of problems the district judge is likely to encounter.

7A C. Wright & A. Miller, Federal Practice & Procedure § 1791 at 193 (1972).[10]

[19-21] We believe the trial judge could have easily concluded that his interest in and duty of controlling the suit in this manner outweighed any interest plaintiffs' attorneys may have in communicating with members of the putative class without the prior approval of the court. Rule 23 imposes on the trial judge the duty of assuring that a class action is an appropriate way to resolve the controversy, the representative parties will fairly and adequately protect the interests of the class, the pleading and trial of the case is conducted fairly and efficiently, and

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10. *See In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 n. 8 (5 Cir. 1977): "In class actions we recognize, indeed insist upon, the court's participation as the manager of the case."

any settlement or compromise is not unfavorable to the class.[11] The present order could be helpful in exercising many of these duties, especially those of assuring fairness and efficiency. Any communication between the parties and class members may mislead the class members by appearing to reflect the opinion of the court rather than that of the party making the communication. This danger exists "simply because of references to the title of the court, the style of the action, the name of the judge, and to official processes." Manual for Complex Litigation, Part 1, § 1.41 at 27 (C. Wright & A. Miller ed. 1977). The trial court should therefore have the power to examine any communication in order to assure that class members will not be misled in this manner. Even apart from any references to the court, communications to potential class members by the parties may unfairly represent facts or issues relevant to the action. When those communications are sent during a limited period in which class members may opt out of the class, or, as here, in which they may accept a back pay offer pursuant to a conciliation agreement, any misleading statement may be irreparable. The trial judge may also believe that requiring prior approval of communications will reduce the risk of the class members becoming confused by an avalanche of notices, inquiries, and arguments directed to them by each of the parties to this action. Thus, there are many substantial reasons a trial judge may believe that an order

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11. Thus, although in the ordinary non-class suit, restrictions such as those in the present case might be entered in the form of a temporary injunction and only after relatively strict scrutiny of specific criteria, the drafters of the Rules felt that the trial judge needed broader powers with respect to class actions and specially imbued the district court with more extensive authority to control the suit.

such as that suggested in the Manual for Complex Litigation is justified.[12]

Plaintiffs assert their interests outweigh these concerns of the trial judge. Plaintiffs argue that to conduct the action adequately they must be allowed to contact class members in order both to discover their case and to inform class members of their civil rights. They allege that the order prevents them from performing those functions. This is not true; the order only prohibits contact with class members without prior approval of the court. Therefore, only plaintiffs' interest in *unrestrained* communications is to be balanced against the court's interests in requiring court approval of all communications sent to class members.

[22-24] Plaintiffs' ability to discover their case is in no way reduced by the requirement that the court approve any contact. It is expected that the trial judge will exercise "minimal judicial control of these communications. . . ." and freely allow discovery. Manual for Complex Litigation, Part 1, § 1.41 at 29 (C. Wright & A. Miller ed. 1977). The trial judge should refuse to allow only those attempts at discovery that would clearly affect the fairness or efficiency of the litigation adversely. Plaintiffs have not shown that this "minimal control" would prejudice them in any way. Therefore, we do not believe

12. The Manual enumerates other potential abuses that may justify the use of such an order, for example: solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; and solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action. Arguably these concerns are not significant in this case in which the potential class is represented by a non-profit organization whose fees are not paid directly by the class members.

plaintiffs have any significant interest in seeking discovery without the prior approval of the court. Similarly, to the extent that Rule 23 implicitly provides plaintiffs with a right to "encourag[e] common participation in the litigation of [plaintiffs' race] discrimination claim," *Coles v. Marsh,* 560 F.2d 186, 189 (3 Cir.), *cert. denied sub nom., Blue Cross v. Marsh,* 434 U.S. 985, 98 S.Ct. 611, 54 L. Ed.2d 479 (1977), that same rule's explicit grant of authority to the trial court to control the conduct and settlement of the action outweighs plaintiffs' right. Therefore, although there may be other methods of achieving similar results,[13] Rule 23 does not prohibit a trial court's discretionary use of an order requiring prior approval of communications with class members.[14]

[25] Plaintiffs next argue that the order is an unconstitutional prior restraint on their communication with the class and is especially egregious in this case in which plaintiffs are represented by an organization highly regarded as an effective opponent of discrimination. This argument is considered and rejected in the recent revision of the Manual for Complex Litigation, Part 1, § 1.41 at

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13. *Compare* Developments in the Law-Class Actions, 89 Harv. L. Rev. 1281, 1601-04 (1976), *with Waldo v. Lakeshore Estates, Inc.,* 433 F.Supp. 782, 792 n. 10 (E.D. La. 1977).

14. Because the trial judge made no findings of fact concerning plaintiffs' attorneys' alleged improprieties, the allegations are irrelevant to our decision. We hold that the trial judge had the power to restrict communications without regard to any allegations of unethical conduct. This holding is necessary because many of the dangers of abuse and irreparable harm discussed above can arise without warning. Requiring the district court to find specific evidence of the dangers in a particular case before acting would severely hamper its ability to control the case. In many instances, the abuses must not merely be punished, but must be prevented. This can be accomplished only if the trial judge can order the restrictions before the abuses have materialized.

1-3 (C. Wright & A. Miller ed. 1978 Cum. Supp.) and in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977). We find it unnecessary, however, to decide whether the interests discussed above would also justify the prior restraint of any constitutionally protected communication. The order in the present case, unlike those in *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3 Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975), *Waldo* or the Manual, explicitly exempts communications that a party or counsel asserts are constitutionally protected from prior restraint.

[26] Despite this provision, plaintiffs argue that the order chills their free exercise of protected activities because they can never be certain that the district court will agree with their assertion that the communication is protected.[15] As an example of such a disagreement, plaintiffs rely on an incident in the trial court. Plaintiffs submitted a document to the court for approval asserting that it was constitutionally protected. The judge refused to allow plaintiffs to send the document to the class members. Plaintiffs argue that if they had sent the document without submitting it they may have been subject to a contempt order. This argument is without merit. The exemption applies when the parties make any communication they *assert* is protected, not merely when the trial judge agrees with that assertion. Thus, as long as a party or counsel makes any unapproved contact with class members in the good faith belief that the contact is constitutionally shielded, he may not be punished for violating

15. *See* Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975): The "proviso exempting constitutionally-protected communication does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule."

the court's order. Once plaintiffs submitted the proposed communication to the district judge, however, the exemption for communications they asserted were constitutionally protected was no longer relevant. At that point the issue became whether the Constitution, in fact, protected the communication rather than whether the plaintiffs had distributed it in the good faith belief that it was constitutionally protected. Plaintiffs have not argued on appeal that the trial judge erred in deciding that he could properly prohibit the distribution of that particular document nor have they alleged his determination was untimely. They have alluded to the incident only as an example of the alleged "chill" the order prohibiting unapproved communication placed on the exercise of their first amendment rights, notwithstanding the exception for communications they asserted to be constitutionally protected. Therefore, we need not decide whether the judge properly prohibited dissemination of this particular notice after plaintiffs submitted it for his approval. We note, however, that even though the prohibition on unapproved communications is permissible, the judge's separate decisions approving or disapproving particular communications would normally be proper subjects for appellate review.

[27] We conclude that the present order adequately safeguards the first amendment rights of the parties and counsel because even if the prohibitions of the order are vague or overbroad, the parties can avoid them if they assert a good faith belief that a particular communication is constitutionally protected. *Cf. Screws v. United States,* 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945): "the requirement of specific intent to do a prohibited act may avoid those consequences to the

accused which may otherwise render a vague or indefinite statute invalid."

[28] Plaintiffs' final contention is that the order violates their right to equal protection of the laws. This claim is based on the assertion that the order allows defendants to offer back pay settlements to the class members and to contact class members in the ordinary course of defendants' business without allowing plaintiffs similar rights. This argument is invalid because it is based on an incorrect reading of the order. The order prohibits defendants as well as plaintiffs from contacting the class members regarding back pay settlements. Rather than allowing further contact by either party, it directs the court clerk to distribute a notice to class members informing them that they have 45 days within which to accept the back pay award to which they are entitled under the conciliation agreement negotiated by the EEOC and directs them not to accept the award if they wish to participate in any recovery secured by plaintiffs in this action. Further, the provision allowing communication with class members in the regular course of business applies equally to all parties and counsel, not merely to defendants. It could be argued that allowing contact in the regular course of business would tend to favor defendants in practice because of their greater day-to-day contact with the employees. Any management discussion of the merits of the suit with class members, however, would not be in the regular course of business. Therefore, although defendants may have greater day-to-day contact with the class members, the order does not allow defendants any greater freedom than plaintiffs in discussing the suit with class members.

We therefore conclude that the district court's order of June 22, 1976, is a permissible exercise of the court's

power to control class action litigation and is prohibited by neither the first nor fifth amendments to the Constitution.

The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

GODBOLD, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I through III of the majority opinion. I dissent from Part IV, which upholds the validity of the district court's order restricting communications by named parties and their counsel with any actual or potential class member not a formal party.

The issue is important. The critical part of the order in question follows the form suggested in the Manual for Complex Litigation, 1977 ed., Pt. 2, § 1.41.[1] This case presents in this circuit for the first time the validity of such an order. Another circuit has taken a position contrary to the majority's decision.[2]

In other cases I have vigorously asserted the power of the district court to manage class actions and other complex cases.[3] But, in my opinion, the restraints imposed

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1. Sample Pretrial Order No. 15. The suggested form is a reprint of a pretrial order entered by the District Court for the Western District of Missouri. *Manual*, Pt. 2, § 1.41 n. 33.

2. *Coles v. Marsh*, 560 F.2d 186 (C.A. 3), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). *See also Rodgers v. United States Steel Corp.*, 508 F.2d 152 (C.A. 3), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

3. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 & n. 8 (C.A. 5, 1977); *Huff v. N. D. Cass Co.*, 485 F.2d 710, 712-13 (C.A. 5, 1973) (en banc).

in this case contravene Rule 23, F. R. Civ. P., and violate freedom of speech and freedom of association as guaranteed by our Constitution.

I. *The history*

Understanding the issues requires a more complete history than the brief statement made by the majority. In April 1976 Gulf and EEOC entered into a conciliation agreement covering alleged racial discrimination by Gulf against black employees at its Port Arthur, Texas plant, pursuant to which Gulf agreed to cease alleged discriminatory practices, establish an affirmative action program, and offer back pay to alleged discriminatees, ranging, for various employees and various periods, between $2.81 per month of service and $5.62 per month of service. The affected employees were not parties to the agreement. Gulf agreed to notify affected employees of the back pay agreed upon; failure of the employee to respond would be regarded as acceptance. According to Gulf, back pay was offered to 614 present and former black employees of the Port Arthur plant.[4]

In May 1976, while implementation of the conciliation agreement was in progress, six present or retired black employees of the Port Arthur plant brought this class suit, under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, on behalf of black employees, black former employees of the plant, and black applicants rejected for employment with Gulf Oil Company (not limited to the Port Arthur plant). Plaintiffs were represented by Stella Morrison, of Port Arthur, Charles E. Cotton, of New Orleans, and three New York attorneys from the NAACP

4. And 29 female employees.

Legal Defense and Education Fund, Jack Greenberg, Barry L. Goldstein and Ulysses Gene Thibodeaux. Plaintiffs asked injunctive and declaratory relief and damages. The defendants are Gulf and the Oil, Chemical and Atomic Workers' Union. Plaintiffs charged that Gulf discriminated against blacks in hiring and job assignments, employed discriminatory tests, paid unequal pay, employed racially tainted promotion and progression practices, denied training to blacks, refused seniority to blacks, and discriminatorily discharged and disciplined blacks. They alleged that the union had agreed to, acquisced in or condoned Gulf's discriminatory practices.

According to affidavits later filed by plaintiffs' counsel a meeting of black employees who were members of the alleged class was held May 22 at the request of the named plaintiffs, plaintiffs' counsel were invited to attend, and some did attend. Gulf was served with process May 24. On May 27, before Gulf filed responsive pleadings, it filed a two-sentence, unsworn request that the court enter an order limiting communications by parties and their counsel with actual or potential class members. The motion was accompanied by an unsworn brief asserting that Ulysses Gene Thibodeaux, one of plaintiffs' attorneys, had recommended to actual and potential class members at a meeting that they not sign receipts and releases sent them pursuant to the conciliation agreement. Further, the brief said that it had been reported to Gulf that Thibodeaux advised the group that they should mail back to Gulf checks received pursuant to the conciliation agreement because he could recover twice as much for them by the pending suit. Gulf asserted in its brief that these actions violated standards imposed on attorneys by law and by the Canons of Ethics. It asserted that an order of

the court was necessary to prevent further communication of the type alleged and that the statements by plaintiffs' attorney would prejudice its defense of the case and the conciliation efforts. In its brief Gulf said that when the summons was served on it approximately 452 of the 643 employees entitled to back pay had received checks and executed general releases.

On May 28, after oral argument by the parties, District Judge Steger entered a temporary order effective until Chief Judge Fisher could return and assume control and administration of the case. His order is substantially the same as paragraph 2 of the modified order, which appears as note 9 of the majority opinion, that is, it contained the restraints without the exceptions. Judge Steger made no findings.

On June 8, Gulf filed an unverified motion to modify the temporary order to permit it to resume offering back pay awards and to receive receipts and releases, as provided by the conciliation agreement. Gulf added, again by an unsworn brief attached to its motion, a new allegation of misconduct by saying that it had been reported to Gulf that Thibodeaux had recommended to the persons at the meeting that even if an employee had signed a receipt and release he should return his check to Gulf. Gulf also filed an affidavit from EEOC stating that it felt the issues in this suit were "almost identical" to those embraced by the conciliation agreement.

Plaintiffs filed an unsworn responsive brief, squarely raising the constitutionality of the order and the district court's authority to issue it. Judge Fisher conducted a hearing on June 10 and allowed time for additional briefs. With their next brief plaintiffs filed affidavits by Thibo-

deaux, Morrison and Goldstein, covering several points. Thibodeaux denied that he advised potential class members not to accept Gulf's offer of settlement and denied that he stated that plaintiffs' counsel could get employees twice as much back pay by suit. According to the affidavits, none of the lawyers accepted or expected compensation from the named plaintiffs or any additional named plaintiffs or from members of the class; the only anticipated compensation was by attorneys' fees awarded by the court against the defendants, and in the case of the LDF attorneys any fees awarded them would be paid over to LDF. The affidavits also set out that it was necessary for plaintiffs and their counsel to communicate with members of the proposed class to investigate systematic and individual racial discrimination, complete discovery, and define issues in the case, and that, because of the back pay offers made by Gulf under the conciliation agreement, it was of crucial importance that plaintiffs' attorneys be able to inform class members of their rights and answer their questions and concerns. In their brief, plaintiffs asserted that many of the issues (specifying several of them) encompassed by the suit were not included within the matters covered by the conciliation agreement.

On June 22, without requiring Gulf to verify its charges of improper and unethical conduct by Thibodeaux, and without making findings of fact, Judge Fisher entered the modified order. He rejected plaintiffs' contention that the order was constitutionally invalid.

I turn to the contents of the modified order. Its opening language is plenary in form. I discuss below the exceptions that appear further on in the order.

The persons enjoined are "all parties hereto and their counsel."[5]

The subject matter forbidden is communications "concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this court." More specific communications which the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The persons with whom communication is forbidden are potential and actual class members.

The second subparagraph of ¶(2) sets out exceptions as provided in the *Manual's* suggested form: communications between attorney and client, and attorney and prospective client when initiated by the prospective client, and communications in the regular course of business. The third subparagraph of ¶(2) is the "constitutional right" exception:

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5. The majority refer several times to the order's restricting communication *by the parties*. Elsewhere they refer to the interests of *plaintiffs' attorneys* in communicating with putative class members. The order bars both named parties and counsel.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

In the modified order Judge Fisher added to the *Manual's* proposed form a provision that the clerk mail a notice to employees covered by the conciliation agreement stating that they had 45 days in which to accept Gulf's offer and that all who delivered receipts and releases within 55 days would be deemed to have accepted. See ¶(4) and ¶(9) of the order. In ¶(8) the court restated the restraints on communication that it had imposed in the earlier part of the order.

On July 6, pursuant to the "constitutional right" exception, plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class. They attached the following notice which they proposed to distribute and asserted that they were constitutionally entitled to distribute it:

Illustration to follow.

C-30

ATTENTION
BLACK WORKERS
OF GULF OIL.

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN.* These lawyers will talk to you *FOR FREE.*

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

Plaintifls alleged in their motion that neither Gulf's offer to employees nor the notice sent by the clerk explained the terms of the conciliation agreement. They asked the court to declare that the notice was constitutionally protected. They noted that under the "constitutional right" exception to the order they were entitled to distribute the notice and file it with the court within five days thereafter. However, because of what they considered to be the vagueness of the order, and "for reasons of prudence," the plaintiffs asked for the court's guidance. Their reasons for asking guidance were not unreasonable. The first subparagraph of ¶ (2) of the order required that *any* proposed communication be presented in writing for prior approval. Paragraph (3) restated all the restraints. The "constitutional right" exception appeared to permit retrospective filing in place of prior court approval. But counsel already charged with unethical and illegal conduct cannot be faulted for electing not to gamble on their interpretation of the order or upon the possibility that if they sent the notice without preclearance the court might find it not constitutionally protected and their assertion of constitutional protection not made

in good faith.[6] As it turned out, their prudence was justified because the court ultimately denied permission to send the notice.

The request for guidance from the court, filed July 6, was appropriate and respectful, and it deserved timely court action. To be effective the notice that plaintiffs proposed to send needed to be distributed promptly. The 45 days for acceptance of Gulf's offer, described in the Clerk's notice, expired on or about August 8. The court did not act on plaintiffs' motion until August 10, when it denied the motion by a one-sentence order without explanation.

II. Misuse of discretion

I believe that the court misused its discretion in entering the order in thise case.[7]

(1) Non-compliance with Rule 23(d)

Rule 23(d) gives the following authority to the court:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties. (Emphasis added.)

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6. *See Rodgers v. United States Steel,* 508 F.2d 152, 161 (CA3), *cert. denied,* 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975): "The attorneys for the plaintiffs, with appropriate caution, declined to test an ambiguous order by violating it and risking contempt."

7. The district court had not adopted a local rule concerning limiting communications in class actions. We are, therefore, not concerned with rule-making power but with the authority of the court inherent or conferred by Congress through the Rules, to impose the limit on communications. The *Manual,* Pt. 2, § 1.41, contains a suggested local rule, an earlier version of which was held invalid in *Rodgers v. United States Steel, supra.*

This provision, added in 1966, gives the trial court "extensive power" to control the conduct of a class action. 7A C. Wright & A. Miller, Federal Practice and procedure § 1791 (1972). There will be situations in which it will be "appropriate" for the court to restrict commuications between counsel and potential class members. But, however, broad "appropriate" may be it is certainly no broader than the limits imposed by the Constitution, as discussed in Part III, below. Pretermitting constitutional limits, it seems to me that the district court must find that restrictions are "appropriate" upon a factual showing by the moving party that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened.[8] In this case, "appropriateness" was not proved and no finding of "appropriateness" was made by either district judge.

The only arguable grounds I perceive for the order's being "appropriate" are the unsworn statements by Gulf that were denied by plaintiffs' attorney under oath, the discussions in the *Manual* of possible abuses of class actions, and the existence of the conciliation agreement in the process of implementation.

With respect to the presence of plaintiffs' counsel at the meeting of employees, it seems to me singularly inappropriate for the district court to rely—if it did rely—

8. The Third Circuit in *Coles v. Marsh,* 560 F.2d 186, 189 (CA3), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), discussed the validity of a similar order restraining communications in terms of the district court's power and held it invalid. Although I reach the same result as the *Coles* court, I think it is preferable to analyze the question in terms of the district court's discretion.

upon Gulf's representations that Thibodeaux made statements which violated both the law and the Canons of Ethics. Gulf never presented proof of this hearsay. Under oath, Thibodeaux denied making such statements.[9]

Nor should a judicial decision on "appropriateness" be rested upon the discussions in the *Manual*. With deference to the opinions of the distinguished Board of Editors concerning the possibility of abuses in class actions, a trial court should not merely presume that in the case before it—indeed in all class actions coming before it—abuses are either present or threatened.[10]

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9. In this appeal Gulf restates the hearsay as though it were fact proved and found. Also it throws in this alternative argument:

> By affidavit, one of the Appellants' attorneys admits to attending the discussions, but denies making any improper statements. Whether the statements, in fact, are true is immaterial since the admitted appearance by Appellants' attorneys at such a meeting provides the potential for abuse of the class action process which the Manual and Rule 23 seeks to prevent.

Br. p. 42. Counsel for Gulf treat more lightly charging an attorney with unethical and improper conduct than I would be willing to do.

10. The *Manual* cites *Weight Watchers of Philadelphia v. Weight Watchers International, Inc.*, 455 F.2d 770 (CA2, 1972), as confirming an "almost unreviewable discretion" in trial courts to regulate communications between counsel and active and poten ial class members. *Weight Watchers* rests upon the unreviewability of discretionary orders by mandamus. The issue is before us by appeal. In *Rodgers*, the Third Circuit said:

> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney*, [331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947)] and *Bridges v. California*, [314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941)] would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. I J. Moore, [Federal Practice ¶ 1.41, at 29 n. 28, (2d ed. 1974, Part 2)].

508 F.2d at 165. *Rodgers* granted mandamus against use of a local rule then appearing in the *Manual* and since amended. I discuss in Part III, below, the constitutional limitations imposed by *Craig v. Harney* and *Bridges v. California*.

The order in this case was entered pursuant to the authority given the district court under Rule 23(d). That rule requires the district judge to exercise his discretion in making orders. He is only authorized to make "appropriate orders," and a determination of what is appropriate requires the exercise of discretion. What is appropriate for one case is inappropriate in another. If communications between counsel and actual and potential members of a class action were always abusive of the class action device then it would be appropriate to automatically enter an order restricting communications. Such communications, however, in many instances serve to effectuate the "purposes of Rule 23 by encouraging common participation in [a lawsuit]." *Coles v. Marsh, supra* at 189. The decision whether to restrict communications in a particular case, therefore, requires an inquiry into the likelihood of abuse and the potential for benefits. The *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case. The rule requires no less.[11]

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11. In *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La., 1977), the district court rejected the claim that it exceeded its rule-making authority under Rule 83 by adopting its Local Rule 2.12(e), identical to the *Manual's* suggested Rule. The court concluded that "[t]he potential abuses attendant upon . . . unregulated communication clearly undermine the efficacy of the class action device." *Id.* at 794. The local rule was, therefore, consistent with the Federal Rules of Civil Procedure, the standard for judging the validity of a local rule. The difficulty with the district court's analysis is that Rule 2.12(e) applies to every case. It does not permit the district judge in an individual case the discretion to not restrict communications, although in some cases it would be inconsistent with the policies of the Federal Rules to restrict communication. A refined approach that does not sweep so broadly that it does away with the benefits of attorney-client contact and recognizes the interests that putative class members have in receiving communications is called for.

Here, at the appellate level, the majority grounds its decision on possibilities rather than actualities. It refers to what the parties "may do," to what the trial judge "could have easily concluded," how the order "could be helpful" to the judge in exercising his Rule 23 duties, to what the judge "may believe" and of how communications "may mislead." This is not the stuff of which judicial decisions are made.

The final potential justification for the court's order is the strong emphasis upon settlement of Title VII disputes by conciliation rather than in the courtroom. *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (CA5, 1975). But, as we noted in *Allegheny-Ludlum*,

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 & n.26 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720,

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The need for such an approach was recognized by District Judge Bue in his report accompanying the Southern District of Texas' amendments to its local rule restricting communications, discussed *infra*. Judge Bue's discussion focuses primarily on constitutional problems with the *Manual's* rule. A similar need for a narrow rule that successfully guards against abuses while not doing away with the benefits of communication is also required so that it does not run afoul of Rule 83's mandate that district courts adopt only local rules that are consistent with the policies of the Federal Rules.

44 L.Ed.2d 295, 302 (1975)). In *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (CA5, 1974), *vacated on other grounds,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed. 2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it freight his choice with restrictions that were not "appropriate" under the circumstances. Gulf had represented to the court that the conciliation agreement was fair and embraced substantially the same issues as the suit. But plaintiffs' counsel had represented that the conciliation agreement was seriously deficient; that on its face it neither made the black employees whole nor satisfied the dictates of Title VII; that the relief supplied was inadequate because the goals were statistically improper, there was no firm commitment to timetables, and there was no relief from illegal testing. Plaintiffs had set out other objections as well. According to plaintiffs, the notices sent out by Gulf did not even explain how back pay was computed.

The conclusion is inescapable that the court's limitation on communications was intended to further employees' accepting conciliation awards in preference to participat-

ing in the suit.[12] Pretermitting whether a court can ever appropriately do this, in this instance it could not, in deciding "appropriateness," elect to favor conciliation and frustrate or chill the right of black employees to choose the litigation route by cutting them off from talking with the named plaintiffs and with the only attorneys who had direct expertise about the suit.

The majority has failed to take into consideration the benefits flowing from communication between the parties and the potential class members. In racial discrimination cases group solidarity may be vital to trigger and to sustain the willingness to resort to legal remedies for the removal of discrimination, but the court order bars black plaintiffs from all communication with fellow blacks employed by Gulf concerning this case. The majority also does not give weight to the need and desire of potential class members for advice of counsel concerning back pay versus lawsuit. The order permits a potential class member to confer with attorneys for plaintiffs at the prospective class member's request. Pragmatically this is a dubious exception. A prospective class member must find out who the attorneys are and when and where to see them, but the actual class members are forbidden to give him this information—or any other information about the case—without prior court approval, nor can counsel furnish this information to potential class members generally.

The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this

12. If not otherwise clear, the court's approach was made clear by its direct entry into the conciliation effort (discussed below), and its withholding action on plaintiffs' request for permission to send the proposed notice until after the time had expired for accepting back pay awards.

question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

The limitations I suggest do not diminish the significance of the potential problems seen by the draftsmen of the *Manual* and by the majority here. I would simply require a showing that the problems are real and not imaginary.

To the extent the majority bases its approval of the lower court's orders on the premise that it is always appropriate to restrict communications in class actions, that premise is peculiarly unfounded in this case. The counsel silenced without factual showing include those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button,* 371 U.S. 415 at 422, 83 S.Ct. 328 at 332, 9 L.Ed.2d 405 at 411-12 (1963), and engaged in "a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 539 n.4 (CA5, 1970).

(2.) *Court involvement in conciliation*

Apart from the order's limit on communications, it inappropriately involved the court in the extra-judicial con-

ciliation effort. Gulf had mailed out back pay offers before suit was filed. In its motion to modify Judge Steger's order, Gulf asked the court to direct the clerk to send notices to all employees who had not accepted its offer and signed releases. Gulf's theory was that the court could do this under its power to supervise a settlement. The court granted the motion and extended the time for acceptance to 55 days from the date of the clerk's notice. The back pay offers were not offers to settle a lawsuit. The nudge given to black employees who had not accepted Gulf's offer, given under the official imprimatur of the court, was not permissible.

I would hold that the order was improvidently entered under the terms of Rule 23(d). Perhaps Rule 23(d) merely restates an implied power of the court. If that is so, exercise of the power is limited by the same restraints on the court's discretion that I have already discussed. I turn then to constitutional limitations.

III. The constitutional issues

The general rule is that otherwise protected utterances concerning the courts may be punished by contempt only if they pose "an imminent, not merely a likely threat to the administration of justice." *Craig v. Harney,* 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546, 1552 (1947). The likelihood must be great that a serious evil will result, and the evil itself must be substantial. *Bridges v. California,* 314 U.S. 252, 260-63, 62 S.Ct. 190, 192-94, 86 L.Ed. 192, 202-03 (1941). Significantly, it is these two cases to which the *Manual* turns in addressing constitutional limitations. Pt. 2, § 141, n.33. Nor does the constitutional rule change when applied to lawyers,

even when they participate in the judicial process. *In re Halkin,* ____U.S. App. D.C.____, 598 F.2d 176, 47 Cr. L. Rep. 2413 (1979). A lawyer's First Amendment rights to comment about pending or imminent litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 249 (CA 7, 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (quoting *In re Oliver,* 452 F.2d 111 (CA 7, 1971)); *accord, Chase v. Robson,* 435 F.2d 1059, 1061 (CA 7, 1970); *cf. U. S. v. Tijerina,* 412 F.2d 661, 666 (CA 10), *cert. denied,* 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969) (reasonable likelihoods that comments by criminal defendants will prevent a fair trial justifies court order prohibiting extrajudicial comments).

In this case the subject matter of the restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients, discussed below. The attorneys may not counsel a black employee free of any effort to solicit him. The Third Circuit, in *Rodgers,* in holding invalid a local rule that contained a similar prohibition on communications between counsel and potential class members [13] did not reach the constitutional issue but noted the problem:

> The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey*

13. The local rule in issue in *Rodgers* did not include the "constitutional right" exception which has been added to the suggested form in the *Manual.* I discuss below that this does not remove the constitutional issue.

State Lottery Comm'n v. United States, 491 F.2d 219 (3rd Cir.), cert. granted, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potentiol black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).

508 F.2d at 162-63.

Next I turn from the general restraint on the attorney to the specific restriction against solicitation in subparagraph (a) of ¶ 2 of the order: "[S]olicitation directly or indirectly of legal representation of potential and actual

class members who are not formal parties to the class action." *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and its progeny, *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagrph (a) is unconstitutional. In *Button*, the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[14] The solicitation was treated as a mode of political expression effectuated through group activity falling within the sphere of associational rights guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At these meetings forms were circulated which authorized LDF attorneys "to represent the signers in legal proceedings to achieve desegregation." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*.[15]

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14. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

15. The notice that plaintiffs asked leave to send does not explicitly solicit persons to engage plaintiffs' attorneys or to join in the class but urges employees to seek legal advice and to become in-

Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of LDF lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the LDF lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case.

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra*. There the Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation, 436 U.S. at 419, 98 S.Ct. at 1899, 56 L.Ed.2d at 427. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the

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formed. It tells employees that plaintiffs' attorneys will talk to them without charge, suggests as an alternative talking to some other attorney, and emphasizes that the class action will proceed. No one is expressly urged to join the class, reject a release, or return a check.

case, the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's punishment of Primus for solicitation violated her First Amendment rights.[16]

Because the activity prohibited by subparagraph (a) of the district court's order is constitutionally protected activity it is necessary to consider whether there is a compelling government interest that justifies the prohibition and whether the means used are sufficiently specific " 'to avoid unnecessary abridgment of associational freedoms.' " *Id.* at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 434-35 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659, 691 (1976)). The *Primus* Court recognized that "the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, [and] lay interference," 436 U.S. at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 435, are evils the state may guard against and that these problems sometimes result from lawyer solicitation of clients. The Court went on to state, however, that prophylactic rules intended to guard against such evils are not permissible when aimed against constitutionally protected forms of solicitation because of their impact on First Amendment rights. *Id.* When dealing with *Button*-type solicitation, as opposed to commercial forms

16. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus*, sustained against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication of illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida*, 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Penn. 1978).

of solicitation, *see Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), discussed in note 16, *supra*, there must be a showing that the solicitation "in fact involved the type of misconduct" 56 L.Ed.2d at 436, that may be constitutionally guarded against. A showing of potential danger does not suffice.[17] The lower court made no findings whether the substantive evils the court was constitutionally entitled to guard against had occurred. Without such findings subparagraph (a) of the order cannot stand.[18]

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17. As stated by the *Primus* Court.

> Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, [1423,] 55 L.Ed.2d 707 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S., at 581, 91 S.Ct. 1076 [, at 1080] 28 L.Ed.2d 339; *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, [1795,] 10 L.Ed.2d 965 (1963); *Button*, 371 U.S. at 442-443, 83 S.Ct. 328 [, at 342-343], 9 L.Ed.2d 405; *Wood v. Georgia*, 370 U.S. 375, 388, 82 S.Ct. 1364, [1371,] 8 L.Ed.2d 569 (1962); *Thomas v. Collins*, 323 U.S. 516, 530, 536, 65 S.Ct. 315 [322, 325,] 89 L.Ed. 430 (1945).

436 U.S. at 434 n.27, 98 S.Ct. at 1906 n.27, 56 L.Ed.2d at 436 n.27.

18. Subparagraph (b) of ¶ 2 of the order forbids solicitation of fees and expenses despite the affidavit setting out that the NAACP provides its services free of charge. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, I think it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar of Michigan, supra*, the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. I would, therefore, give such activity constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation presents some of the dangers

Subparagraph (d) of ¶ 2 is applicable to this case and is in my view facially unconstitutional. It is narrower than the plenary proscription in the first sentence of the order, which prohibits all communications concerning the suit. Subparagraph (d) prohibits what might be called "objectionable communications." It prohibits all communications "which *may* tend to misrepresent [the class action] . . . and . . . which *may create* impressions tending, without cause to reflect adversely on any party, any counsel, this Court or the administration of justice." (Emphasis added.) The order is overbroad because it is not limited to the clear and present danger test. "May tend to misrepresent," and "may create impressions" are not enough to justify suppression of protected speech. *See Chicago Council of Lawyers v. Bauer, supra* at 249. Also, while speech that poses an imminent threat to the fair administration of justice may be properly prohibited, speech that reflects adversely on any party or counsel may not. The only interests to which the First Amendment may be subordinated are compelling government interests. The government has no compelling interest in assuring that nothing unflattering will be said about Gulf or its attorneys.

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recognized in *Primus* and *Ohralik* that a state or court may properly guard against. If the funds are to be used to defray litigation expenses, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672, 673 (S.D. Ohio, 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Penn., 1974), *modified*, 69 F.R.D. 117 (1975).

Subparagraph (c) of ¶ 2, relating to solicitation of "opt out" requests, seems to me to have no application to this case. It applies only to Rule 23(b)(3) class actions, and this action was brought pursuant to 23(b)(2).

It seems to me unnecessary to dwell at length on the vagueness of the order, particularly subparagraph (d). In advising a potential class member of the relative merits of class action versus back pay offered under the conciliation award, counsel will almost inevitably say something that will be construed to reflect upon Gulf's offer—indeed that is at the heart of this whole matter of lawsuit versus settlement. If counsel goes to an employees' meeting at all,[19] the only safe advice to him is to remain mute.

In a thoughful analysis of the constitutional issues involved in this case, District Judge Boyle, in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La., 1977), rejected a constitutional attack on his district's Local Rule 2.12(e) which is identical to the *Manual's* suggested rule. The court recognized that its rule.

> restricts not only certain expressions by parties and counsel, but also impinges upon the constitutionally-derived interest of the recipient(s) to secure the communication. . . . Likewise limited by the rule's operation is the opportunity of the plaintiff organization to communicate concerning legal redress with those members who are not formal parties to the suit, which activity ordinarily would be entailed in the freedom of association and the collective right of an organizational membership to achieve effective judicial access.

Id. at 787 (citations and footnote omitted). The court then went on to catalogue the interests served by the

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19. Assuming merely being there is not "indirect communication" as Gulf would seem to contend, *see* n.9, *supra*.

Local Rule: (1) prohibition of solicitation of representation or funds protects laymen from unscrupulous attorneys and helps preserve the legal profession's image; (2) preservation of the court's obligation "to direct the 'best notice practicable' to class members, advising them of their privilege to exclude themselves from the class," *id.* at 790, pursuant to Rule 23(c)(2) for class actions brought under Rule 23(b)(3); and (3) the administration of justice by preventing misrepresentations. *Id.* at 790-91. The court found these objectives sufficiently important to override the inhibitions on First Amendment rights and that the rule is the least drastic alternative.

I have several problems with the district court's analysis. First, the three categories of interests served by the rule can be tied to the specific prohibitions. The court does not explain how the plenary prohibition against all communications absent prior approval serves the specified goals other than to note that "the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any . . . attempt at prohibition by itemization." *Id.* at 791-92. I think the plenary prohibition in the first sentence of ¶ 2 of the order is facially overbroad. Communications that do not threaten any of the interests enumerated by the court are prohibited. When dealing with First Amendment rights, greater specificity is required.

District Judge Bue of the Southern District of Texas reached the same conclusion as I reach in his analysis of the amendments his district adopted to the *Manual's* suggested rule. The Southern District's rule contains only the specific prohibitions, dropping the across-the-board re-

straints. The primary reason for the change was to avoid a violation of the First Amendment by overbreadth: "The key to a constitutional rule which regulates class communication is to narrow down those instances in which a prior restraint is imposed to those in which the types of communications subject to judicial review before dissemination are clearly defined and clearly capable of Rule 23 abuse." Bue, *Analysis of Proposed Revision of Local Rule 6 of the United States District Court for the Southern District of Texas,* (quoted in *Bulletin, Manual for Complex Litigation,* Federal Judicial Center, 9-10 (Aug. 25, 1978)).

Also, *Waldo* fails to distinguish between commercial forms of solicitation and *Button*-type solicitation. The significance of this distinction has already been discussed. Because the rule does not make this distinction, its prohibition on solicitation is overbroad. The government interests that may legitimately be protected by prohibiting commercial solicitation do not usually need to be protected when *Button*-type solicitation is involved because it does not pose the same dangers as commercial solicitation. Moreover, the constitutional scrutiny given to a ban on commercial solicitation or punishment for engaging in such solicitation is significantly lower than the scrutiny given prohibitions on *Button*-type solicitation. Commercial solicitation is protected only by the commercial speech doctrine, which requires a lower level of scrutiny than required when there is an infringement of the constitutional rights of association and political expression which occurs when *Button*-type solicitation is prohibited. *Compare In re Primus, supra, with Ohralik v. Ohio State Bar Association, supra.*

The *Waldo* court's concern with protecting the administration of justice from misrepresentations of cases pending before it is legitimate. But the "reasonable likelihood" standard incorporated in the rule simply fails to comply with constitutional standards.

The proviso permitting post-distribution filing of a notice thought to be constitutionally protected is not a cure. "This provision does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the [*Manual's*] proposed rule." Comment, 88 Harv. L. Rev. 1911, 1922 n.74 (1975). The majority's conclusion that the assertion of a good faith belief gives total protection is disingenuous. The district court would still be entitled to inquire into the bona fides of counsel's belief.[20] Because counsel may be called upon to establish the basis for his good faith belief, and therefore is put at risk for possibly violating the court's order, the good faith exception does not ameliorate the chilling effect of the order. It is little comfort for a conscientious attorney to be told that he may communicate with potential class members but that at a later time may be called upon by the court to justify the communication.[21] Even if facially a cure, the constitu-

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20. Although *Screws v. U.S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), probably requires a showing of specific intent to violate the court's order, that is certainly not the total protection from punishment envisioned by the majority; indeed, it indicates that assertion of good faith is not total protection.

21. The majority argues that "[o]nce plaintiffs submitted the proposed communication to the district judge . . . the exemption for communications they asserted were constitutionally protected was no longer relevant." The issue before the district court on a motion for permission to distribute would be whether the proposed communication is constitutionally protected, but the issue on this appeal is the constitutionality vel non of the order. In our examination of this issue, the constitutional exception provision is certainly relevant; in-

tional exception is no cure as applied to these plaintiffs who prudently asked for pre-distribution approval of the leaflet reproduced above rather than risk post-distribution filing and were given a belated denial.

IV. Conclusion

The district court misued its discretion under Rule 23 (d) and violated the constitutional rights of plaintiffs' counsel, named plaintiffs and all other actual or potential members of the class by entering the orders. I dissent from Part IV of the majority opinion and would vacate the district court's order as modified.

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deed the unwillingness of the attorneys to rely on the exception in distributing the leaflet demonstrates the order's chilling effect. It is the proof of the pudding. Having lost on their motion to have the order restraining their communications declared unconstitutional, the reasonable—and respectful—course for them to follow was to ask the court's guidance before distributing the leaflet rather than take their chances under the constitutional exception. I assume that the majority does not mean that had the plaintiffs specifically renewed their constitutional objection to the order at the time they requsted permission to distribute the leaflet the chilling effect of the order could not have been considered by the district court. Such a position would be untenable. It is not necessary to disobey a court order to be able to make a chilling effect attack on it. Indeed, the exact opposite is normally required. A party may not violate a court order and then in a contempt proceeding for violating the order challenge its constitutionality. *Walker v. City of Birmingham*, 388 U.S. 307, 316-17, 87 S.Ct. 1824, 1830, 18 L.Ed.2d 1210, 1217 (1967).

JAMES C. HILL, Circuit Judge, specially concurring:

Being bound by the prior decisions of this Court, as I ought to be, I concur. *Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187, 1190 n.10 (5th Cir. 1978).

My observations concerning the path upon which we embarked in *Zambuto v. American Telephone and Telegraph Co.,* 544 F.2d 1333 (5th Cir. 1977) are set out in my dissent to the opinion for the En Banc Court n *White v. Dallas Independent School District,* 581 F.2d 556, 563 (5th Cir. 1978) (Hill, J., concurring in part and dissenting in part).

APPENDIX D

First Order of the District Court Limiting Communications, Dated May 28, 1976

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT
OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs,

VS.

GULF OIL COMPANY, ET AL,
Defendants.

ORDER

Having considered the Motion by the Defendant, Gulf Oil Corporation, to limit communications with any potential or actual class member;

IT IS ORDERED that, in this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action. The communications forbidden by this order include, but are not limited to, (a) solicita-

tion directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order shall be effective until Judge Fisher returns and can hear the matter upon formal motion.

Counsel for defendant, Gulf Oil Corporation, shall present a motion on this matter to Judge Fisher as soon as possible upon Judge Fisher's return.

Date: May 28, 1976.

WILLIAM M. STEGER
United States District Judge

APPENDIX E

Second Order of the District Court Limiting Communications, Dated June 22, 1976

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT
OF TEXAS
BEAUMONT DIVISION

B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs

VS.

GULF OIL COMPANY, ET AL,
Defendants

ORDER

The within and foregoing motion of Gulf Oil Corporation to modify Judge Steger's Order dated May 28, 1976, having been considered;

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to

communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of public office or agency (such as the Attorney General)

which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U. S. Equal Employment Opportunity Commission and the Office of Equal Opportunity, U. S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3589 (U.S. April 20, 1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice

and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

ENTERED this the 22nd day of June, 1976.

JOE J. FISHER
United States District Judge

APPENDIX F

Order of the District Court Granting Defendant's Motion for Summary Judgment, Dated January 11, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-183-CA

WESLEY P. BERNARD, et al.

VS.

GULF OIL COMPANY, et al.

ORDER

BE IT REMEMBERED that on this day came on for consideration the Motion to Dismiss of defendant Gulf Oil Company [Gulf], joined in by the defendant, Oil, Chemical and Atomic Workers International Union and Local Union No. 4-23 [Unions]. After proper notice to the parties by an Order of this Court, the Motion to Dismiss is to be treated under Rule 56, F.R.Civ.P., because the defendants offered, and the Court accepted evidence extrinsic to the pleadings in the form of affidavits. The parties were allowed more than 10 days to submit any additional pertinent information. Taking into consideration all material presented by the parties prior and subsequent to the decision to treat the Motion as one for

summary judgment, the Court must conclude that the Motion is well taken and should be granted in all particulars.

While it is not necessary that all members of a class bring a charge with the Equal Employment Opportunity Commission [EEOC] as a prerequisite to joining as co-plaintiff in litigation, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), the class representatives must show that they have complied with the required preliminary administrative steps and timely filed suit in this Court. *Macklin v. Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C. Cir. 1973). At this stage in the history of Title VII litigation, it goes without saying that a plaintiff who seeks to represent a class may not bring suit in District Court until he has filed a complaint with the EEOC. 42 U.S.C. § 2000e-5(f) (1974).

The affidavits submitted reveal that neither of the plaintiffs Elton Hayes, Sr., nor Rodney Tizeno has filed a complaint with the EEOC with regard to a discrimination charge against Gulf or the Unions. Thus neither Hayes nor Tizeno may maintain suit in their own right, *Love v. Pullman Co.*, 404 U.S. 522 (1972); *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), and therefore could not adequately represent a class. Rule 23(a), F.R.Civ.P.

Of course this failing should not prevent maintenance of the Title VII portion of this suit as a class action if others of the named plaintiffs have satisfied the jurisdictional requirements and could raise a viable claim here. Unfortunately this is not the case.

Title VII requires that suit be instituted in the District Court within 90 days after notice from the EEOC that

> * * * the Commission has not filed a civil action under this section * * * *or* the Commission has not entered into a conciliation agreement to which the person aggrieved is a party. (emphasis supplied).
>
> 42 U.S.C. § 2000e-5(f)(1).

Plaintiffs Willie Johnson, Sr., Wesley Bernard, and Hence Brown received such notice from the EEOC on February 26, 1975, after it was sent the previous day. Plaintiff Willie Whitley's failure of conciliation letter was sent December 4, 1973. The mailing of these letters began the running of the 90 day period for filing a civil action on the associated claim, under the clear language of the statute set out above.

Unfortunately the EEOC had adopted a troublesome two letter procedure whereby after sending the failure of conciliation notice, it would later issue a "right to sue" letter at the complaintant's request. The first letter, however, advised the claimant that he should contact an attorney or request assistance from the EEOC in doing so prior to the issuance of the "right to sue" letter and prepare for suit if desired. The two letter system was entirely a figment of the imagination of the EEOC, since it is not mandated or suggested by 42 U.S.C. § 2000e-5(f). As is ably pointed out by Gulf in its brief, the events which trigger notice are listed in the disjunctive so that the occurrence of any one of the listed events (such as failure of conciliation) and subsequent notice thereof empowers the claimant with the right to bring action in this Court. To hold that the 90 day period did not begin to run until after the claimant requests and receives the second letter would amount to allowing him unlimited discretion in choosing a time for filing suit.

The leading decision to the contrary, *Tuft v. McDonnell Douglas Corporation,* 517 F.2d 1301 (8th Cir. 1975), has not been followed in this Circuit. *See Turner v. Texas Instruments, Inc.,* 401 F.Supp. 1179 (N.D. Texas 1975); *Kelley v. Southern Products,* Civ. No. 19243 (N.D. Georgia 1975); *Barfield v. A.R.C. Security, Inc.,* 9 E.P.D. ¶ 10,136 (N.D. Georgia 1975). Judge Porter's decision in *Turner v. Texas Instruments, Inc., supra,* is most persuasive in its examination of 42 U.S.C. § 2000e-5(f), its legislative intent, and cases decided thereunder. His analysis of the erroneous rationale employed in cases supporting the two letter system, and the fact that jurisdiction must be construed strictly, *Genovese v. Shell Oil Co.,* 488 F.2d 84 (5th Cir. 1973), convinces this Court that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC.

Since this cause was not filed until May 18, 1976, more than 90 days had elapsed from the sending of the failure of conciliation notice by the EEOC. The Title VII claim must be dismissed.

Plaintiffs' secondly assert a cause of action under 42 U.S.C. § 1981. Since the claim was the subject of complaints filed with the EEOC in 1967 by three of the plaintiffs, nine years had elapsed before court action on it was initiated. Since the plaintiffs allowed more than two years to run before filing suit, and because the filing of an EEOC complaint does not toll the limitation period, *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975), any cause of action under § 1981 is barred and must be dismissed. Tex. Rev. Civ. Stat. Ann. art 5526(4). Defendants' reasoning is convincing that all plaintiffs complain of the identical pattern of discrimination which was

the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated. Thus, any claim by Tizeno, Hayes and Whitley must be dismissed along with that of Bernard, Brown and Johnson. The Court additionally finds no circumstances of continuous discrimination that would justify application of the principles discussed in *Williams v. Norfolk & Western Railroad Co.*, 530 F.2d 539, 542 (4th Cir. 1975); *Johnson v. Railway Express Agency, supra* at 467 n. 13; and *Briggs v. Brown & Williamson Tobacco Co.*, 414 F.Supp. 371, 378 (E.D. Va. 1976).

The Court also acknowledges a most compelling argument for the application of the equitable doctrine of laches in this particular case, based not only on the obvious lack of diligence on the part of the plaintiffs, but a recognition that to put this defendant to the task of obtaining records and locating witnesses after the expiration of such a lengthy period would pose a particularly onerous burden. *Afro-American Patrolmens League v. Duck*, 503 F.2d 294, 299 (6th Cir. 1974). In this regard see the affidavit of C. B. Draper, made a part of the record on October 15, 1976. It is accordingly

ORDERED, ADJUDGED and DECREED that summary judgment be and the same is hereby granted for the defendants in this cause, as to both the class action and any individual claims of discrimination by the plaintiffs.

RENDERED this the 11th day of January, 1977.

JOE J. FISHER
United States Chief District Judge

APPENDIX G

Affidavit of Herbert C. McClees Concerning Respondent Whitley, Dated August 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs

V.

GULF OIL COMPANY, ET AL,
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Willie Whitley, Charge No. THU3-0454.

1. Letter dated December 4, 1973, from the EEOC Houston District Office, to Charging Party Willie Whitley informing Mr. Whitley that the EEOC had found no cause to believe discrimination had occurred pursuant to Mr. Whitley's charge, and an attached Notice of Right to Sue informing Mr. Whitley that he had 90 days from the receipt of said Notice to bring an action against Gulf Oil Corporation in federal district court.

2. Returned receipt for certified mail signed by Mr. Willie Whitley, indicating that he receive certified letter No. 599314 from the EEOC Houston District Office on December 5, 1973.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity
Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

My Commission Expires June 1, 1977.

G-3

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

CERTIFIED MAIL

Charge No. THU3-0454
Case No. YHU4-433
Date Filed: 09-06-72
Date Served: 10-02-72

Willie Whitley
1619 East 13th Street
Port Arthur, Texas 77640 Charging Party

Gulf Oil Corporation
P. O. Box 701
Port Arthur, Texas 77640 Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19b of the Commission's procedural rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

The timeliness and all other requirements have been met; within the meaning of Title VII, the Respondent is an employer.

The Charging Party alleges that Respondent violated Title VII with respect to training and other terms and conditions of employment because of his race, Negro. The evidence does not support the charge.

Evidence obtained by the Commission shows that the Charging Party was not denied training and disqualified

for reasons which were not, in and of themselves, illegally discriminatory. Further, the evidence shows that other persons, regardless of race, were treated in the same general manner as was the Charging Party. No evidence was discovered which shows that persons of other races, ethnic groups, or sex were treated differently from the Charging Party, in similar circumstances.

The Commission has many times held that in situations such as this, where persons are equally treated there is no violation of Title VII. The Charging Party's mere assertion that there was discrimination under Title VII is not sufficient for a finding of illegal employment practices.

Having examined the entire record, I conclude that there is not reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the manner alleged.

This determniation concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, the Charging Party may do so by filing a private action in Federal District Court within 90 days after receipt of this letter and by taking the other procedural steps set forth in the enclosed Notice of Right-to-Sue.

On behalf of the Commission:

HERBERT C. McCLEES,
Herbert C. McClees,
District Director

Date: Dec. 4, 1973.

G-5

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

DATE DEC 4 1973

Willie Whitley 1619 East 13th Street Port Arthur, Texas 77640	FROM: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HOUSTON DISTRICT OFFICE 2320 LA BRANCH - ROOM 1101 HOUSTON, TEXAS 77004

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:	EEOC REPRESENTATIVE	
[X] NO REASONABLE CAUSE [ ] UNTIMELY CHARGE	Max Fuentes, Jr., Attorney	
[ ] NO JURISDICTION [ ] FAILURE TO PROCEED	TELEPHONE NUMBER 713/226-5611	CASE/CHARGE NUMBER YHU4-433 THU3-0454

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Herbert C. McClees,
District Director

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address where delivered ☐ Deliver ONLY to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO.

CERTIFIED NO.
599314

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
Willie Whitley

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
Doris M. Whitley

DATE DELIVERED
12-5-73

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

Willie Whitley vs Hudson Oil Corp. TH 43-0454

Hudson Oil Corp.

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

No. 599314

SENT TO
Willie Whitley

STREET AND NO.
1619 East 13th St.

P.O., STATE AND ZIP CODE
Port Arthur 77640

POSTMARK OR DATE
12/4/73
161

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... 15¢
With delivery to addressee only ..... 65¢
2. Shows to whom, date and where delivered .. 35¢
With delivery to addressee only ..... 85¢
DELIVER TO ADDRESSEE ONLY ..... 50¢
SPECIAL DELIVERY (extra fee required)

TH 43-0454
MP
Legal

PS Form 3800
Apr. 1971

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See other side)

GPO : 1972 O - 450-343

APPENDIX H

Affidavits of Nacha I. Martinez Concerning Respondent Hayes, Dated August 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF NACHA I. MARTINEZ

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Nacha I. Martinez being duly sworn, deposes and says:

(1) I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas, where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of Equal Employment Technician.

(2) In my position as Equal Employment Technician I am custodian of the records, files and office memoranda located in the EEOC's Houston District Office. Specifically, I have custody of files which would show whether a particular person has at any time filed a charge with the EEOC's Houston District Office.

(3) I have made a complete search of the EEOC's Houston District Office's records, and according to our records, Mr. Elton Hayes, Sr. has never filed a charge of discrimination with the EEOC against Gulf Oil Corporation or the Oil, Chemical and Atomic Workers International Union, or Local Union No. 4-23, Oil Chemical and Atomic Workers.

NACHA I. MARTINEZ
Nacha I. Martinez
Equal Employment Technician
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

My Commission Expires June 1, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF NACHA I. MARTINEZ

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Nacha I. Martinez being duly sworn, deposes and says:

(1) I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas, where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of Equal Employment Technician.

(2) In my position as Equal Employment Technician I am custodian of the records, files and office memoranda located in the EEOC's Houston District Office. Specifically, I have custody of files which would show whether

a particular person has at any time filed a charge with the EEOC's Houston District Office.

(3) I have made a complete search of the EEOC's Houston District Office's records, and according to our records, Mr. Rodney Tizeno has never filed a charge of discrimination with the EEOC against Gulf Oil Corporation or the Oil, Chemical and Atomic Workers International Union, or Local Union No. 4-23, Oil Chemical and Atomic Workers.

NACHA I. MARTINEZ
Nacha I. Martinez
Equal Employment Technician
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

APPENDIX I

Affidavits of Herbert C. McClees Concerning Respondents Johnson, Brown and Bernard, Dated August 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Willie Johnson, Sr. Charge No. AU7-6-543/543U.

1. Letter dated February 25, 1975, from James R. Anderson, Equal Opportunity Specialist (E), to Charging Party Willie Johnson regarding the Respondents non-desire to entertain conciliation discussions and that a "Notice of Right to Sue" could be requested.

2. Returned receipt for certified mail signed by Mr. Willie Johnson, Jr. indicating that he received certified letter No. 543499 from James R. Anderson, Equal Opportunity Specialist (E) on February 26, 1975.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 543499
RETURN RECEIPT
REQUESTED

Willie Johnson, Sr.
347 W. 18th
Port Arthur, Texas 77640

Dear Mr. Johnson:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

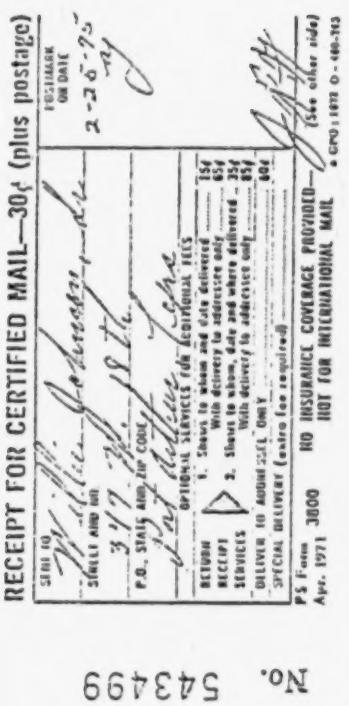
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj



RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

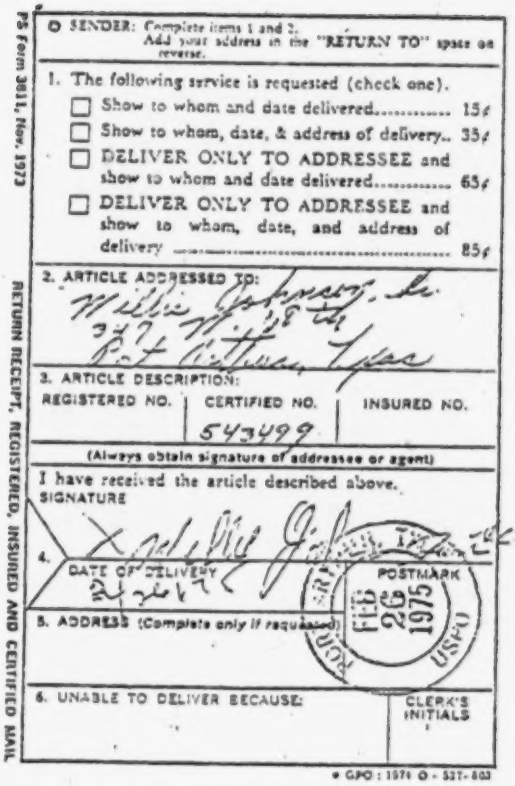
SENT TO: Willie Johnson, Jr.
STREET AND NO.: 347 W. 28th St.
P.O., STATE AND ZIP CODE: Port Arthur, Texas
POSTMARK OR DATE: 2-26-75

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered — With delivery to addressee only — 15¢
2. Shows to whom, date and where delivered — With delivery to addressee only — 35¢
DELIVER TO ADDRESSEE ONLY — 85¢
SPECIAL DELIVERY (extra fee required) — 90¢

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side) • GPO : 1971 O - 406-343

No. 543499



PS Form 3811, Nov. 1973 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

O SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO: Willie Johnson, Jr. 347 W. 28th St. Port Arthur, Texas

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	543499	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE: X Willie Johnson Jr.

4. DATE OF DELIVERY: 2-26-75 — POSTMARK: FEB 26 1975 USPO

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

• GPO : 1974 O - 537-803

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Hence Brown, Charge No. AU7-6-540/540U.

1. Letter dated February 25, 1975, from James R. Anderson, Equal Opportunity Specialist (E), to Charging Party Hence Brown regarding the Respondents non-desire to entertain conciliation discussions and that a "Notice of Right to Sue" could be requested.

2. Returned receipt for certified mail signed by Mr. Hence Brown, indicating that he received certified letter No. 579187 from James R. Anderson, Equal Opportunity Specialist (E) on February 26, 1975.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

My Commission Expires June 1, 1977.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 579187
RETURN RECEIPT
REQUESTED

Hence Brown
740 E. 14th
Port Arthur, Texas 77640

Dear Mr. Brown:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj

PS Form 3811, Nov. 1973 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

3. ARTICLE ADDRESSED TO:

4. ARTICLE DESCRIPTION:

REGISTERED NO. | CERTIFIED NO. | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE

DATE OF DELIVERY (POSTMARK)

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☐ 1. The following service is requested (check one).
☐ Show to whom and date delivered ..... 15¢
☐ Show to whom, date, & address of delivery ..... 35¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered ..... 65¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

☐ 2. RESTRICTED DELIVERY

☐ 3. ADDRESS TO WHICH DELIVERY IS DESIRED, IF DIFFERENT FROM ITEM 1

☐ 4. RESTRICTED DELIVERY

☐ 5. SPECIAL HANDLING

☐ 6. RETURN RECEIPT

☐ 7. SHOW TO WHOM AND DATE DELIVERED

☐ 8. SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY

☐ 9. RESTRICTED DELIVERY

☐ 10. SPECIAL DELIVERY

☐ 11. SHOW TO WHOM AND DATE DELIVERED

☐ 12. SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY

☐ 13. RESTRICTED DELIVERY

☐ 14. SPECIAL DELIVERY

☐ 15. SHOW TO WHOM AND DATE DELIVERED

☐ 16. SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY

☐ 17. RESTRICTED DELIVERY

☐ 18. SPECIAL DELIVERY

☐

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

Before me, on this day personally appeared Herbert C. McClees who upon oath says:

I am the District Director of the Houston District Office of the Equal Employment Opportunity Commission, and in that capacity I hereby certify that the attached copies hereto are true and correct copies of the official records of the Equal Employment Opportunity Commission in the charge filed by Mr. Wesley Bernard, Charge No. AU7-6-535/535U.

1. Letter dated February 25, 1975, from James R. Anderson, Equal Opportunity Specialist (E), to Charging Party Wesley Bernard regarding the Respondents non-desire to entertain conciliation discussions and that a "Notice of Right to Sue" could be requested.

2. Returned receipt for certified mail signed by Mr. Wesley P. Bernard, indicating that he received certified letter No. 579182 from James R. Anderson, Equal Opportunity Specialist (E) on February 26, 1975.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Equal Employment Opportunity Commission
Houston District Office

Sworn to and subscribed before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

My Commission Expires June 1, 1977.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004
February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 579182
RETURN RECEIPT
REQUESTED

Wesley Bernard
717 Thomas
Port Arthur, Texas 77640

Dear Mr. Bernard:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

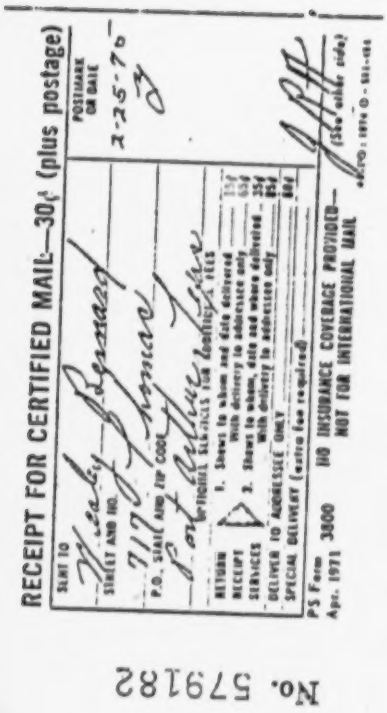
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj



RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

POSTMARK OR DATE: 2-25-76

SENT TO: Wesley Bernard
STREET AND NO.: 717 W. Spruce
P.O., STATE AND ZIP CODE: Port Arthur, Texas
SPECIAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered — 15¢
With delivery to addressee only — 10¢
2. Shows to whom, date and where delivered — 35¢
With delivery to addressee only — 25¢
DELIVER TO ADDRESSEE ONLY — 85¢
SPECIAL DELIVERY (extra fee required)

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side)

No. 579182

PS Form 3811, Nov. 1973 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

O SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO:
Wesley Bernard
717 W. Spruce
Port Arthur, Texas

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	579182	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE: [signature]

4. DATE OF DELIVERY: 2-26-76 — POSTMARK: FEB 26

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

* GPO : 1974 O - 537-865

APPENDIX J

Notices of Right to Sue within Ninety Days Addressed to Wesley P. Bernard and Hence Brown, Jr., Dated June 11, 1976

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

WESLEY P. BERNARD
CHARGE NO. AU7-6-535
DATE FILED: 6-24-67

v.

GULF OIL CORPORATION
PORT ARTHUR, TEXAS

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to

the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES
Herbert C. McClees, District Director
Equal Employment Opportunity Commission

Date: June 11, 1976

J-3

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004

HENCE BROWN, JR.
CHARGE NO. AU7-6-540
DATE FILED: 6-24-67

v.

GULF OIL CORPORATION
PORT ARTHUR, TEXAS

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES
Herbert C. McClees, District Director
Equal Employment Opportunity Commission

Date: June 11, 1976

APPENDIX K

**Affidavit of Nacha I. Martinez,
Dated August 2, 1976,
Accompanied by Letter of James R. Anderson
Addressed to Willie Johnson, Sr.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF NACHA I. MARTINEZ

THE STATE OF TEXAS §
COUNTY OF HARRIS §

Nacha I. Martinez being duly sworn, deposes and says:

(1) I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas, where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of Equal Employment Technician.

(2) In my position as Equal Employment Technician I am custodian of the records, files and office memoranda located in the EEOC's Houston District Office. Specifically, I have custody of files which would show all documents which have been sent to charging parties by the EEOC's Houston District Office.

(3) Mr. Willie Johnson, Sr. filed a discrimination charge with the EEOC against Gulf Oil Corporation and Local Union No. 4-23, Oil Chemical and Atomic Workers on June 24, 1967. Mr. Johnson never filed a discrimination charge with the EEOC against the Oil, Chemical and Atomic Workers International Union. On February 25, 1975, the EEOC's Houston District Office sent Mr. Willie Johnson, Sr., a letter signed by Mr. James R. Anderson, Equal Opportunity Specialist, a true copy of which is attached hereto as Exhibit A. According to the returned receipt, a true copy of which is attached hereto as Exhibit B, that letter was received by Mr. Johnson on February 26, 1975. A review of our records indicates Mr. Johnson has at no time requested a "Notice of Right to Sue" from this office.

NACHA I. MARTINEZ
Nacha I. Martinez,
Equal Employment Technician
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before
me this 2nd day of August, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

My Commission Expires June 1, 1977.

K-3

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Houston District Office
2320 La Branch, Room 1101
Houston, Texas 77004
February 25, 1975

Case Nos. AU7-6-504/504U thru
AU7-6-532/532U,
AU7-6-533,
AU7-6-534/534U thru
AU7-6-546/546U and
AU68-8-71/71U

CERTIFIED NO. 543499
RETURN RECEIPT
REQUESTED

Willie Johnson, Sr.
347 W. 18th
Port Arthur, Texas 77640

Dear Mr. Johnson:

On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company - U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Repsondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.

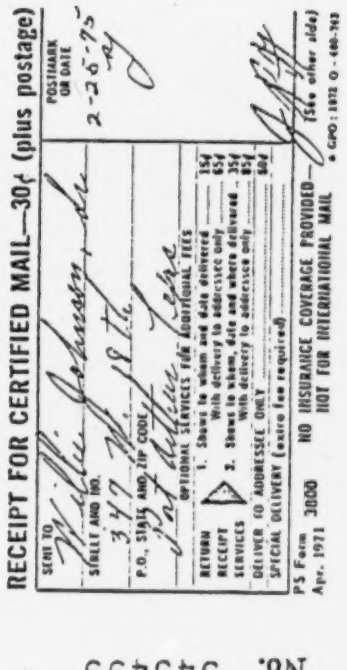
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

If you have any questions, please feel free to call upon me.

Sincerely,

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist(E)

JRA:slj



RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

SENT TO: Willie Johnson, Jr.
STREET AND NO. 347 W. 18th
P.O., STATE AND ZIP CODE Port Arthur, Texas
POSTMARK OR DATE 2-25-75

OPTIONAL SERVICES FOR ADDITIONAL FEES
RETURN RECEIPT SERVICES
1. Shows to whom and date delivered — 15¢
With delivery to addressee only — 65¢
2. Shows to whom, date and where delivered — 35¢
With delivery to addressee only — 85¢
DELIVER TO ADDRESSEE ONLY — 50¢
SPECIAL DELIVERY (extra fee required) — 50¢

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side) — GPO : 1972 O - 480-769

No. 543499

PS Form 3811, Nov. 1973 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
- ☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO:
Willie Johnson, Jr.
347 W. 18th
Port Arthur, Texas

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	543499	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE X Willie Johnson, Jr.

4. DATE OF DELIVERY 2-26-75 — POSTMARK FEB 26 1975 USPO PORT ARTHUR TEXAS

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

* GPO : 1974 O - 537-803

APPENDIX L

Order of the District Court Denying Plaintiff's Motion to Communicate, Dated August 10, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

ORDER

Having considered Plaintiffs' Motion for Permission to Communicate with the Proposed Class:

IT IS ORDERED that the Motion is hereby denied.

JOE J. FISHER
United States District Judge

APPENDIX M

Order of the District Court to Treat Motion to Dismiss as Motion for Summary Judgment, Dated November 29, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-76-183-CA

WESLEY P. BERNARD, et al.

v.

GULF OIL COMPANY, et al.

ORDER

BE IT REMEMBERED that on this day came on for consideration the Court's own motion that the outstanding Motion to Dismiss in this cause be treated under Rule 56, F.R.Civ.P., as suggested by *Georgia Southern & F. Ry. Co. v. Atlantic Coast Line R. Co.*, 373 F.2d 493 (5th Cir. 1967). Since all parties should be allowed a reasonable opportunity to present all material made pertinent to such a motion, the Court believes that January 3, 1977, is a reasonable deadline for the submission of such material. The Motion should be treated as motion for summary judgment. It is accordingly

ORDERED, ADJUDGED and DECREED that the outstanding Motion to Dismiss shall be treated as motion for summary judgment under Rule 56, F.R.Civ.P., and further it is

ORDERED, ADJUDGED and DECREED that the parties submit any and all pertinent materials to said motion by, and no later than, January 3, 1977.

RENDERED this the 29th day of November, 1976.

JOE J. FISHER
United States Chief District Judge

APPENDIX N

**Affidavit of C. B. Draper,
Dated October 12, 1976**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL
Plaintiffs

V.

GULF OIL COMPANY, ET AL
Defendants

AFFIDAVIT OF C. B. DRAPER

STATE OF TEXAS
COUNTY OF HARRIS

C. B. Draper, being duly sworn, deposes and says:

1. I am an employee of Gulf Oil Corporation and am located in Port Arthur, Texas, at Gulf's Port Arthur Refinery. I have been an employee of Gulf Oil Corporation for the past 42 years and during that time I have held various positions with the corporation.

2. At the present time I hold the position of Director, Human Resources Administration. I have held this posi-

tion since my appointment on July 1, 1976. The basic function of my job is to direct and coordinate the Human Resources administrative functions of employment, compensation, training, employee development and equal employment opportunity matters and programs for the Port Arthur Refinery. Among my specific responsibilities and duties are:

(a) Determine the needs of the employment program and direct the total employment program for all employees;

(b) Determine the needs and direct the development and administration of training programs for all Refinery personnel;

(c) Determine the needs and direct the employee development program functions and placement functions to assure that employees are developed, identified and placed where they can make their greatest possible contribution to the company;

(d) Plan and direct equal employment opportunity programs and matters related to compliance with laws and directives;

(e) Determine the needs and direct the implementation and maintenance of personnel records and reports;

(f) Determine the needs and direct the development, application and maintenance of the salary administration program; and

(g) Serve as the chairman of the committee appointed by the Refinery Manager to review job applicants.

3. Prior to becoming Area Director, Human Resources Administration, I was Director, Personnel, Wage and Salary Administration, from April 19, 1967 to July 1, 1976. While in this position, it was my responsibility to interpret and maintain wage and salary scales, employment, training and employee activities programs and to develop organization and employee relations policy guides. I was also charged with the maintenance of files of job descriptions, job specifications and related wage and salary information. Under my direct supervision was the maintenance of employment and personnel files and records.

4. I have read and am familiar with the Complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, Styled: *Wesley P. Bernard, et al v. Gulf Oil Company,* et al, Civil Action No. B-76-183-CA (hereinafter referred to as "the suit"). The suit was brought by six employees of Gulf Oil Corporation (hereinafter referred to as "Gulf") at its Port Arthur Refinery against Gulf and the Oil, Chemical and Atomic Workers International Union and Local Union No. 4-23. In paragraph 12 of their Amended Complaint, the Plaintiffs allege that the discriminatory acts participated in by Gulf and the Union occurred "prior and subsequent to July 2, 1965".

5. A review of the records under my custody and control reflects that there have been numerous changes in personnel with regard to the management of the Port Arthur Refinery. Since July 2, 1965, there have been four different Refinery Managers; three different Managers of Human Resources; four different Engineering Managers; four different Operations Managers; and three different Service Managers.

6. The records under my custody and control reflect that of the eleven labor supervisors, the individuals who would have supervised the employment of the Plaintiffs, only two are still in that position while six have retired from the employment of Gulf.

7. The records under my custody and control reflect that the individual who was charged with the responsibility of the employment of personnel for the Port Arthur Refinery from 1965 through 1970 is now deceased. Mr. R. T. Morgan, who died on March 18, 1970, was the individual charged with responsibility of employing individuals at the Port Arthur Refinery, including administering pre-employment tests; grading those tests; posting the scores of those tests; and recommending to management whether or not the individual should be hired. In addition, Mr. Morgan was involved with recruiting individuals for employment at the Port Arthur Refinery during the period of 1965 through 1970.

8. Mr. Morgan's knowledge of the employment practices of Gulf including pre-employment testing; grading of pre-employment tests; posting the scores of pre-employment tests; and criteria used in recommending candidates for permanent employment is irreplaceable since the records under my custody and control indicate that through Gulf's regular record retention program all pre-employment tests given to job applicants have been destroyed for the period of 1965 through 1971. There are no other sources for the pre-employment test given to each job applicant other than the knowledge which Mr. R. T. Morgan possessed.

9. The records under my custody and control reflect that Mr. F. F. Timmins, who was a member of the Labor

Relations Department at the Port Arthur Refinery and who was charged with investigating grievances and complaints of individual employees, is now deceased. The records reflect that Mr. Timmins was in charge of employee grievances and complaints from 1965 through 1974. Mr. Timmins was charged with the responsibility of receiving employee grievances and complaints and then speaking with the employee and his supervisor with regard to those complaints. Thus, any complaints or grievances concerning the terms and conditions of employment; employment testing; promotion; or other working conditions was within the knowledge of Mr. F. F. Timmins.

10. The records under my custody and control reflect that all tests given to employees to determine whether or not they were to be promoted during the years 1965 through March, 1971, have been destroyed. Thus, if any employee at Gulf's Port Arthur Refinery took a test for the purposes of determining whether or not he would be promoted during the years 1965 through March, 1971, the tests which that individual took have been destroyed and are not available. There is no other source of information which could duplicate or reconstruct the test taken by the employee seeking the promotion.

11. The documents under my custody and control indicate that effective April 17, 1975, all disciplinary letters that did not result in an employee suspension and which had been placed in an employee's personnel file were removed and destroyed. Thus, if any employee at the Port Arthur Refinery had been reprimanded or disciplined for any infraction of the rules, regulations or other standards governing his behavior and duties as an employee during the years 1965 through 1975 evidence

of such reprimand would have been destroyed in April, 1975. The documents destroyed would have included any written memoranda concerning oral warnings given to an employee.

11. The records under my custody and control reflect that numerous documents relating to the terms and conditions of employment of employees at Gulf's Port Arthur Refinery no longer exist. The company maintains records at its Port Arthur Refinery under a four year retention program. This means that many documents which are four years or older have been destroyed pursuant to Gulf's document retention policy. Under this program the following documents pertaining to the period 1965 through 1971 no longer exist:

(a) Time sheets showing the number of hours which Union employees worked;

(b) Time punch cards showing the number of hours a Union employee worked;

(c) Report of hours worked for each Union employee;

(d) Affidavits signed by Union employees for failure to punch the time clock;

(e) Vacation record cards;

(f) Payroll distribution sheets;

(g) Change of rate and transfer blanks showing permanent or temporary movement in the lines of progression of Union employees;

12. The information which I have stated in this Affidavit is of my own personal knowledge and accurately reflects the information contained in the records under my custody and control at Gulf's Port Arthur Refinery.

/s/ C. B. DRAPER

Subscribed and sworn to before me this 13 day of October, 1976.

/s/ JUDY R. LANE
Notary Public in and for
Harris County, Texas

APPENDIX O

**Affidavit of Herbert C. McClees
Stating EEOC's Position,
Dated June 3, 1976**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ET AL,
Plaintiffs

V.

GULF OIL COMPANY, ET AL,
Defendants

AFFIDAVIT OF HERBERT C. McCLEES

STATE OF TEXAS
COUNTY OF HARRIS

Herbert C. McClees, being duly sworn, deposes and says:

1. I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of District Director.

2. In my position as District Director, I am charged with directing all activities of the Commission for the twenty-six county area surrounding Houston, Texas, including the counties of Jefferson and Orange. Within this geographic area I have the authority, as vested in me by the EEOC, to investigate charges which have been filed against individuals under Title VII of the Civil Rights Act of 1964, as amended. In addition, I have the authority to enter into a Conciliation Agreement settling the charges against the individual when the facts and circumstances of a particular case so dictates. In most cases, after a charge has been filed with the EEOC an employee under my direction and supervision investigates the charge to determine whether or not reasonable cause exists to believe that the act has been violated. If the investigator finds reasonable cause to believe the act has been violated, the EEOC attempts to settle all differences by entering into a Conciliation Agreement which in some cases will provide for an award of back pay to the affected employees and an affirmative action program to ensure continued compliance with Title VII.

3. I have read and am familiar with the Complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, styled: *Wesley P. Bernard, et al v. Gulf Oil Company, et al,* Civil Action No. B-76-183-CA (hereinafter referred to as "the suit"). The Complaint was brought by six employees of Gulf Oil Corporation (hereinafter referred to as "Gulf") at its Port Arthur Refinery against Gulf and the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. In their complaint these individuals have alleged that Gulf and the Union have

discriminated against them in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. Of the six employees who filed this action, three have filed charges with the EEOC, while three have failed to file charges with the EEOC. Of the three employees who have filed charges, two have requested right to sue letters be issued, which requests are presently being processed. The issues raised in the Complaint are almost identical to those issues which were investigated by the EEOC and which were the subject of a Conciliation Agreement signed April 14, 1976 by Gulf, the EEOC and the Office for Equal Opportunity, U. S. Department of Interior (OEO). The Conciliation Agreement specifically provides that the Agreement does not constitute an admission by Gulf of any violation of Title VII of the Civil Rights Act of 1964, as amended.

4. The charges which have been raised in the suit have been the subject of an EEOC investigation which has been conducted over the past eight years. During this time interval, the EEOC, among other things, interviewed employees of Gulf at its Port Arthur Refinery; examined all relevant documents and business records of Gulf; conducted on-site investigations at Gulf's Port Arthur Refinery; and held numerous meetings with Gulf's executives. It is my opinion that this investigation was extremely thorough and comprehensive since it covered all Negro employees employed by Gulf on July 2, 1965, whose seniority date antecedes January 1, 1957 (the defined affected class of Negro employees in the Conciliation Agreement). In order to identify this "affected class" the EEOC conducted a thorough search in order to identify all individuals potentially entitled to back pay under the Con-

ciliation Agreement. The personnel records of all affected employees retained by Gulf since the effective date of Title VII of the Civil Rights Act of 1964 were exhaustively analyzed by the EEOC and no persons potentially entitled to a back pay award could be found other than those listed on Attachments "A" and "B" attached to the Conciliation Agreement. In addition to the award of back pay, the Conciliation Agreement provided for an affirmative action program where specific goals and timetables were set mandating that Gulf recruit, hire, and promote minorities. In order to ensure that Gulf complies with the terms of the Conciliation Agreement, including awarding back pay to the affected class and complying with the affirmative action goals and timetables, Gulf must report to the EEOC every six months for a period of five years its progress in conforming to the provisions of the Conciliation Agreement. I have read the prayer for relief in the Plaintiffs' Complaint and it is my opinion that the relief which the EEOC has obtained by way of the Conciliation Agreement provides the same kind of relief which the Plaintiffs seek in their suit.

6. Under the Conciliation Agreement, Gulf was required to notify in writing each member of the affected class that he or she was entitled to an award of back pay and of the conditions of waiver or release required in accepting such an award. The Agreement provided that each member of the affected class shall be furnished a form on which to notify Gulf, within 30 days, whether such member desires to accept or decline the back pay consideration. A failure on the part of any member to respond within the 30 days would be interpreted as an acceptance of back pay under terms of the Agreement.

The EEOC approved the form of letter and release which was sent to each member of the affected class. The Conciliation Agreement provides that upon fulfillment of the obligations thereunder, Gulf would be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur Refinery.

7. Gulf commenced mailings under terms of the Agreement approximately three weeks prior to the filing of the suit. Up until the time that Gulf was served with a summons in the suit, it had complied faithfully and fully with all terms of the Conciliation Agreement and approximately 431 Negro employees out of a total of 616 Negro employees entitled to a back pay award had signed releases and received their back pay award. However, Gulf notified the EEOC on the date it was served with a summons in the suit that they could no longer continue to fulfill certain provisions of the Conciliation Agreement until the Court allowed further contact with potential or actual class members to the suit.

8. So that the employees may receive their back pay awards it is my opinion that Gulf should now be allowed to proceed with completing the back pay awards and receiving releases under the terms of the Conciliation Agreement since that Agreement is a fair, equitable, thorough and comprehensive solution to the charges that Gulf has

discriminated at its Port Arthur Refinery in violation of Title VII of the Civil Rights Act of 1964.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before me
this 3rd day of June, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, postage prepaid, properly addressed to the following attorneys of record for the parties in this case: Mr. Ulysses G. Thibodeaux, Mr. Jack Greenberg, Mr. Barry L. Goldstein, Mr. Patrick O. Patterson, and Mr. Carl A. Parker.

WM. G. DUCK

Dated: September 17, 1980

NO. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

WM. G. DUCK*
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Houston, Texas 77001
(713) 754-2953

Counsel for Petitioner Gulf Oil Company

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Washington, D.C. 20005

ULYSSES GENE THIBODEAUX
425 Alamo Street
Lake Charles, Louisiana 70601

Counsel for Respondents

* Counsel of Record

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

Petition for Certiorari Filed September 17, 1980

Certiorari Granted December 8, 1980

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May 18, 1976—Plaintiffs' original petition filed in U.S. District Court for Eastern District of Texas, Beaumont Division.

May 27, 1976—Defendant Gulf's motion to limit communications with any potential or actual class member filed.

May 28, 1976—Order signed by Judge Steger limiting communications with any potential or actual class members.

June 8, 1976—Defendant Gulf's motion to modify order limiting communications filed.

June 11, 1976—Hearing held on motion to modify order limiting communications.

June 17, 1976—Motion by defendant Gulf Oil Corporation to dismiss complaint filed.

June 22, 1976—Order entered by Judge Fisher modifying Judge Steger's order limiting communications with any potential or actual class members.

June 30, 1976—Notice mailed to Gulf's Port Arthur, Texas, refinery employees as per order of June 22, 1976.

July 1, 1976—Plaintiff's motion to amend complaint filed.

July 6, 1976—Plaintiffs' motion for permission to communicate with members of the proposed class filed.

July 19, 1976—Order entered permitting plaintiffs to file amended complaint.

July 28, 1976—Motion by defendant Gulf Oil Corporation to dismiss amended complaint filed.

July 30, 1976—Defendant Oil Chemical and Atomic Workers' International Union, Local Union No. 4-23, response to plaintiffs' amended complaint filed.

August 10, 1976—Order entered denying plaintiffs' motion for permission to communicate with the proposed class.

August 25, 1976—Oil, Chemical and Atomic Workers International Union and Local No. 4-23 of the OCAW joins defendant Gulf Oil Company in its motion to dismiss.

September 2, 1976—Report to the court by Gulf Oil Corporation of individuals who have accepted benefits under the conciliation agreement.

September 24, 1976—Hearing held on defendant's motion to dismiss.

November 29, 1976—Order entered that motion to dismiss filed by defendant shall be treated as motion for summary judgment and that parties should submit all pertinent materials to said motion by January 3, 1977.

January 11, 1977—Order that summary judgment be granted for the defendants as to both the class action and any individual claims of discrimination by the plaintiffs.

February 9, 1977—Plaintiffs' notice of appeal filed.

June 15, 1979—Opinion of the Court of Appeals for the Fifth Circuit.

September 27, 1979—Order entered granting rehearing *en banc* in the Court of Appeals for the Fifth Circuit.

June 19, 1980—Opinion of the Court of Appeals *en banc*.

July 17, 1980—Judgment of Court of Appeals rehearing *en banc*.

December 8, 1980—Order entered by Supreme Court of the United States allowing certiorari.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5-18-76	1	COMPLAINT Issued Summons and delivered to U. S. Marshal, Beaumont, Texas.
5-25-76	11	Marshal's Return on Summons to Gulf Oil Company, served to R. B. Short, Ref. Manager, on 5-24-76 at 3:50 p.m. $9.00
5-27-76	12	MOTION by Gulf to Limit Communications with any Potential or Actual Class Member submitted by Atty., Joseph H. Sperry for Defendant, Gulf Oil Company.
5-27-76	16	MEMORANDUM in Support of Gulf's Motion to Limit Communications with any Potential or Actual Class Member.
5-28-76	20	ORDER signed by Judge Steger on Motion by Gulf to Limit Communications with any potential or actual class member. This ORDER shall be effective until Judge Fisher returns and can hear the matter upon formal motion. Attys. of Record apprised. V.74,P.10
5-28-76	22	Marshal's Return on Summons, served to Mr. Parker on 5-26-76 at 12:10 p.m. $9.00
6-7-76		Hearing on Motion by Gulf Oil to Limit Communications with any potential or actual class member for Friday, June 11, at 10:00 a.m. by Judge Fisher. Attys. of Record notified by telephone Monday, June 7, 1976, and follow-up letter.

DATE	NR.	PROCEEDINGS
6-8-76	23	NOTICE OF MOTION TO MODIFY ORDER by Defendant.
6-8-76	24	MEMORANDUM IN SUPPORT OF GULF OIL CORPORATION'S MOTION TO MODIFY ORDER.
6-8-76	38	MOTION TO MODIFY ORDER. Attys. of Record apprised.
6-10-76	40	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER, by Plaintiff.
6-10-76	81	Defendant, Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 Response to Plaintiff's ORIGINAL COMPLAINT.
6-16-76	85	FIRST SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GI LF's MOTION TO MODIFY ORDER.
6-17-76	97	MOTION by Defendant Gulf Oil Corporation to Dismiss Complaint. Attorneys of Record apprised.
6-17-76	99	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO MODIFY ORDER, by Plaintiff.
6-22-76	117	ORDER that motion of Gulf Oil Corporation to modify Judge Steger's Order is granted and that Judge Steger's Order of May 28, 1976 be modified. s/Judge Fisher. Attorneys of record apprised. V.74,P.

DATE	NR.	PROCEEDINGS
7-1-76	123	MOTION to Amend Complaint.
7-1-76	125	MEMORANDUM OF LAW IN SUPPORT of Plaintiffs' Motion to Amend.
6-30-76	128a-128e	Notice (Appendix I) mailed to Port Arthur, Texas Gulf Refinery employees as per Order of June 22, 1976.
7-6-76	129	MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS by Plaintiffs. Attys. of Record apprised.
7-6-76	135	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS.
7-15-76	142	MEMORANDUM ON BEHALF OF GULF OIL CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS.
7-19-76	150	ORDER granting Plaintiff's MOTION TO AMEND COMPLAINT. s/Judge Fisher. Attys. of Record Apprised. V.75,P.44
7-19-76	151	AMENDED COMPLAINT by Plaintiff.
7-28-76	162	MOTION BY DEFENDANT GULF OIL CORPORATION TO DISMISS AMENDED COMPLAINT. Attys. of Record apprised.
8-6-76	164	MEMORANDUM in Support of Defendant, Gulf Oil Corporation's, Motion to Dismiss Amended Complaint.

DATE	NR.	PROCEEDINGS
8-6-76	204	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Willie Johnson, Sr.
8-6-76	208	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Elton Hayes, Sr.
8-6-76	210	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Rodney Tizeno.
8-6-76	212	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Wesley P. Bernard.
8-6-76	216	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Willie Whitley.
8-6-76	222	AFFIDAVIT OF HERBERT C. McCLEES with reference to Willie Whitley.
8-6-76	228	AFFIDAVIT OF HERBERT C. McCLEES with reference to Willie Johnson, Sr.
8-6-76	231	AFFIDAVIT OF HERBERT C. McCLEES with reference to Hence Brown.
8-6-76	234	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Hence Brown.
8-6-76	238	AFFIDAVIT OF HERBERT C. McCLEES with reference to Wesley Bernard.
8-30-76	241	DEFENDANT, OIL, CHEMICAL AND ATOMIC WORKERS' INTERNATIONAL UNION, LOCAL UNION NO. 4-23 RESPONSE TO PLAINTIFFS' AMENDED COMPLAINT.

DATE	NR.	PROCEEDINGS
8-10-76	245	ORDER on Plaintiffs' Motion for Permission to Communicate with the Proposed Class is DENIED. s/Judge Fisher. Attorneys of Record apprised. V.75,P.142
8-20-76	246	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO DISMISS AMENDED COMPLAINT.
8-25-76	256	OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 4-23 of the OCAW joins, Defendant, Gulf Oil Company, in its MOTION TO DISMISS. Attys. of Record apprised.
9-2-76	258	REPORT TO THE COURT BY GULF OIL CORPORATION OF INDIVIDUALS WHO HAVE ACCEPTED BENEFITS UNDER THE CONCILIATION AGREEMENT.
9-2-76	273	MOTION FOR ORAL ARGUMENT ON GULF'S MOTION TO DISMISS. Attys. of Record apprised.
9-14-76	274	ORDER that oral arguments on Gulf's Motion to Dismiss will be set on September 24, 1976 at 10:00 a.m. Signed by Judge Fisher. Attys. of Record apprised. V.76,P.77
9-24-76		Hearing held on Defendant's Motion to Dismiss. Motion taken under Advisement. Counsel given to 10-15-76 to file Memoranda or Briefs: Deft. given to 10-22-76 to file proposed Findings of Fact and Conclusions of Law and

DATE	NR.	PROCEEDINGS
		Pltf given to 10-29-76 to file objections to such proposed Findings of Fact and Conclusions of Law.
9-23-76	275	Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint.
10-7-76	287	Plaintiffs' Motion for an Order Permitting the Appearance of Additional Counsel, Patrick O. Patterson, Esq.
10-18-76	289	LETTER BRIEF with regards to Defendants' Motion to Dismiss the Amended Complaint, by Plaintiffs. (Apparently, Original copy was mailed to Judge Fisher).
10-15-76	301	Supplemental Memorandum in Support of Defendants' Motion to Dismiss.
10-15-76	315	Affidavit of C. B. Draper.
10-14-76	321	ORDER entered by Judge Fisher granting motion for Patrick O. Patterson, 10 Columbus Circle, Suite 2030, New York, New York 10019 leave to appear as additional counsel for Plaintiff. Certified copy to all counsel of record. V.76,P.274
10-26-76	323	Plaintiffs' SECOND SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT with proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW.

DATE	NR.	PROCEEDINGS
10-29-76	337	Defendants' SECOND SUPPLEMENTAL MEMORANDUM OF LAW in Support of its Motion to Dismiss the Amended Complaint.
11-24-76	343	NOTICE of Motion, by Plaintiffs.
11-24-76	344	MOTION to Join Additional Defendants and for Leave to Amend Complaint filed by Plaintiffs. JJF 11-30-76.
11-24-76	355	MEMORANDUM OF LAW in Support of Plaintiffs' Motion to Join Additional Defendants and to Amend Complaint.
11-24-76	361	AFFIDAVIT of Wesley P. Bernard.
11-29-76	367	ORDER that Motion to Dismiss be treated as motion for summary judgment under Rule 56, F.R.Civ. P. and that the parties submit all pertinent materials to said motion by 1-3-77, JJF Attorneys notified. V.77,P.
12-17-76	368	MEMORANDUM in Support of Gulf's Limited Opposition to Plaintiffs' Motion to Join Additional Defendants and for Leave to Amend Complaint. JJF 12-17-76.
1-3-77	381	Plaintiffs' MEMORANDUM in Response to Order Treating Defendants' Motion to Dismiss as a Motion for Summary Judgment. JJF 1-3-77.

DATE	NR.	PROCEEDINGS
1-11-77	387	ORDER that summary judgment be granted for the defendants as to both the class action and any individual claims of discrimination by the plaintiffs. JJF s/1-11-77. Attorneys notified. V.78,P.
2-9-77	392	NOTICE OF APPEAL to U. S. Court of Appeals, Fifth Circuit, by Plaintiffs from Order of Dismissal entered on January 11, 1977. Certified copy of Notice of Appeal mailed to Fifth Circuit Court of Appeals, New Orleans, LA, Jerry Bloxom, U. S. Court Reporter, Beaumont, Texas, Judge Fisher, and all attorneys of record.
2-9-77	393	AFFIDAVIT of Cecil L. Cain, with Calcasieu Insurance Agency, Inc. of Lake Charles, LA, who has applied for a surety bond with the WESTERN SURETY COMPANY.
2-18-77	395	BOND for Costs through Western Surety Company of Sioux Falls, SD for $250.00.

In The
UNITED STATES DISTRICT COURT
For The Eastern District Of Texas
Beaumont Division

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ELTON HAYES, SR., RODNEY TIZENO, HENCE BROWN, JR., WILLIE WHITLEY, WILLIE JOHNSON, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

GULF OIL COMPANY and OIL, CHEMICAL and ATOMIC WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 4-23,
Defendants.

COMPLAINT

I.

NATURE OF CLAIM

1. This is a proceeding for declaratory and preliminary injunctive relief and for damages to redress the deprivation of rights secured to plaintiffs and members of the class they represent by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

II.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1334(4), 42 U.S.C. § 2000e-5(f), 2201 and 2202, this being a suit in equity authorized and instituted pursuant to the Civil Rights Acts of 1866, 42 U.S.C. § 1981, and 1964, 42 U.S.C. §§ 2000e *et seq.* The jurisdiction of this Court is invoked to secure the protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e *et seq.*, providing for injunctive and other relief against discrimination in employment on the basis of race and (b) 42 U.S.C. § 1981 providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

III.

CLASS ACTION

3. Plaintiffs bring this action on their own behalf, and pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure as a class action on behalf of those similarly situated. The members of the class and/or subclasses represented by plaintiffs are: (a) all black employees employed by defendant Gulf Oil Company in Port Arthur, Texas; (b) all black employees formerly employed by Gulf Oil Company in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said company. The requirements of the Federal Rules are met in that:

a. The members of the class are so numerous that joinder of all members would be impracticable. There are, for example, more than 300 blacks employed by Gulf Oil Company in Port Arthur, Texas;

b. There are questions of law and fact common to the class. It is alleged herein that defendants have discriminated against virtually every black employed by Gulf Oil Company in respect to the terms and conditions of their employment;

c. The claims of the plaintiffs are typical of the claims of the class and/or subclasses;

d. The plaintiffs will fairly and adequately protect the interests of the classes and subclasses. The interests of the plaintiffs are identical or similar to those of the class members;

e. The defendants have acted and refused to act on grounds generally applicable to the class and subclasses, thereby making appropriate final injunctive and declaratory relief with respect to all members of the classes;

f. The questions of law and fact common to the members of the class and subclasses predominate over questions affecting only individual members; a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV.

PLAINTIFFS

4. Plaintiff Wesley P. Bernard is a black citizen of the United States and Port Arthur, Texas. Plaintiff Bernard has been employed by Gulf Oil Company since June 16, 1954. He was hired as a laborer and is presently a truck driver.

5. Plaintiff Elton Hayes, Sr., is a black citizen of the United States and Port Arthur, Texas. Plaintiff Hayes has been employed at Gulf Oil Company since October 2, 1946. He was hired as a laborer and is presently a boilermaker, having worked at various "helper" positions during his employment at Gulf Oil Company.

6. Plaintiff Hence Brown, Jr., is a black citizen of the United States and Port Arthur, Texas. Plaintiff Brown was hired as a laborer in 1954 and presently works as a truck driver.

7. Plaintiff Willie Whitley is a black citizen of the United States and Port Arthur, Texas. He was hired in 1946 as a laborer and retired in October, 1975, as a utility man, a classification slightly above a laborer classification.

8. Plaintiff Rodney Tizeno is a black citizen of the United States and Port Arthur, Texas. Plaintiff Tizeno was hired originally as a laborer and is presently a craftsman at Gulf Oil Company.

9. Plaintiff Willie Johnson is a black citizen of the United States and Port Arthur, Texas. Plaintiff Johnson was hired as a laborer at Gulf Oil Company.

V.

DEFENDANTS

10. Defendant Gulf Oil Company in Port Arthur, Texas (hereinafter simply Gulf Oil) is a corporation incorporated and/or doing business in the State of Texas. It operates and maintains a manufacturing plant in Port Arthur, Texas which produces a variety of oil and petroleum products and by-products. Gulf Oil is a corporation

engaged in interstate commerce, employing more than fifteen persons, and is an employer within the meaning of 42 U.S.C. §§ 2000e-(b).

11. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 is recognized as the exclusive bargaining representative of operating and maintenance employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions and terms of employment. Local Union No. 4-23 is a labor organization within the meaning of 42 U.S.C. § 2000e-(d),(e).

VI.

STATEMENT OF FACTS

12. Black employees of Gulf Oil are, and have in the past, been victims of systematic racial discrimination by defendants Gulf Oil and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. Prior and subsequent to July 2, 1965, Gulf Oil engaged in policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) and 42 U.S.C. § 1981 which discriminate or have the effect of discriminating against plaintiffs and the classes they represent because of their race and color.

13. The methods of discrimination include, but are not limited to, intentionally engaging in the following practices:

a. Hiring and Assignment: Gulf Oil unlawfully has assigned and continues to assign a disproportionately large number of black employees to the Company's

lowest paying, least preferred, and more physically demanding jobs;

b. White employees are given preference in initial employment and job assignments by Gulf Oil. The company utilizes a battery of tests which discriminates or has the effect of discriminating against blacks in initial employment with the Company. In addition, Gulf Oil maintains a high school diploma requirement and, on information and belief, other pre-employment criteria which discriminate or have the effect of discriminating against black applicants. Because of discrimination in hiring and job assignment, a disproportionately large number of whites have been preferentially hired by Gulf Oil for higher paying jobs than blacks with substantially the same or better qualifications. Black employees are now, and have in the past, been paid less money for harder work under less desirable working conditions than their white counterparts;

c. The use of a pre-employment test battery is legally deficient in one or more of the following ways: (1) it is not professionally developed; (2) it has little or no relationship to successful job performance; (3) it has little or no relationship to the job sought or applied for; (4) it exhibits a racial and cultural bias against blacks;

d. Defendant company employs a disproportionately small number of blacks in permanent craft positions. Blacks have been historically excluded from higher paying craft positions by Gulf Oil;

e. Gulf Oil has failed and/or refused to promote black employees and "helpers" to journeymen posi-

tions, irrespective of their ability to perform the job or position sought;

f. As a result of the Company's racial promotion and upgrading practices, "black" lines of progression, job classifications and departments have been artificially established and developed with the result that blacks have been and are now confined to the lower-paying and less-preferred jobs than are their white counterparts;

g. Black employees have been denied training, access and exposure to craft positions and other instructions which are necessary to an upgrade or promotion. Blacks who perform the same or comparable work as whites are given unequal pay and compensation;

h. On information and belief, Gulf Oil also discriminatorily denies blacks their full employment rights in that it denied blacks who work in largely minority occupied jobs or departments, seniority rights, opportunities, and privileges. Generally, Gulf Oil has refused and/or failed to recognize the full seniority rights of its black employees, adversely affecting their discharges, training, upgrade, transfer, and promotion rights.

g. On information and belief, Gulf Oil has discriminatorily excluded blacks and has refused and/or failed to recruit and train blacks for supervisory, technical, professional, and clerical positions;

h. Gulf Oil discriminatorily assesses discipline and discharge against black employees for reasons which would not be grounds for discipline or discharge of whites in similar positions;

14. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 has agreed to, acquiesced in or otherwise condoned the unlawful employment practices referred to in paragraph VI(13)(a-h), *supra.*

VII.

EXHAUSTION OF REMEDIES

15. Neither the State of Texas nor the City of Port Arthur has a law prohibiting the unlawful practices herein alleged.

16. All jurisdictional prerequisites to this action have been satisfied. This action is timely commenced under both 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981.

VIII.

PRAYER FOR RELIEF

THEREFORE, plaintiffs and the classes represented pray as follows:

A. That this Court formally determine, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, that this action is maintainable on behalf of the class and/or subclasses described in paragraph III(3), *supra.*

B. That this Court issue affirmative relief as follows:

a. that Gulf Oil be required to institute an active recruitment policy;

1. That Gulf Oil be required to canvass the qualifications of all its black employees with the goal to pro-

mote all such qualified employees and to eliminate all present effects of past racial discrimination with the following provisions:

a. that plaintiffs and the classes be afforded full utilization of company seniority in bidding for or seeking better paying and more desirable jobs;

b. restructuring lines of progression, revision of applicable residency requirements, advanced level entry, and job skipping at Gulf Oil Company;

c. training and other assistance as necessary to enable the plaintiffs and the class to overcome the effects of past discrimination;

d. an award of back pay to each plaintiff and class member for any financial losses suffered by plaintiffs and the classes and which are attributable to acts of racial discrimination complained of herein;

e. rate protection sufficient to assure that black employees will not be economically discouraged, prevented or penalized in their efforts to attain their rightful place in Gulf Oil's employment structure;

f. prospective red circling to alleviate the residual effects of any racial discrimination not corrected or completely removed by this action;

g. Gulf Oil be required to suspend the use of any and all tests or other criteria for promotion or for initial employment until said tests or criteria are validated in accordance with the Equal Employment Opportunity Commission Guidelines on Testing;

h. that the defendant Union, Local 4-23, be required to file all grievances of its black members of Gulf Oil;

i. enter a declaratory judgment that the acts and practices complained of are in violation of the laws of the United States;

j. that plaintiffs and the classes they represent be awarded their complete costs of this action, including a reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k).

k. Grant Plaintiffs and the classes they represent such other and further relief as may be necessary and proper.

Respectfully submitted,

STELLA M. MORRISON
Stella M. Morrison
World Trade Building - Suite 516
440 Austin Avenue
Port Arthur, Texas 77640

CHARLES E. COTTON
348 Baronne Street - Suite 500
New Orleans, Louisiana 70112

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10 Columbus Circle - Suite 2030
New York, New York 10019

Attorneys for Plaintiffs

MOTION BY GULF TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER

[Caption Omitted in Printing]

Filed May 27, 1976

Comes now Gulf Oil Corporation (Gulf), a Defendant in the above-captioned suit, and moves this Court for an order limiting communications by parties to this suit and their counsel with any actual or potential class members.

In support of this Motion, Gulf has attached a memorandum brief.

JOSEPH H. SPERRY
WM. G. DUCK
P. O. Box 3725
Houston, Texas 77001
Telephone: (713) 226-1617

By J. H. SPERRY
Attorneys for Defendant
GULF OIL CORPORATION

[Certificate of Service Omitted in Printing]

MEMORANDUM IN SUPPORT OF GULF'S MOTION TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER

[Caption Omitted in Printing]

Filed May 28, 1976

This is a class action suit brought by six individual employees of Gulf's Port Arthur Refinery alleging they have been victims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The suit was filed on May 18, 1976, and Gulf was served with a summons on May 24, 1976.

The issues which have been raised in this lawsuit have been the subject of settlement negotiations between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior. The negotiations between Gulf and these federal agencies to conciliate the issues which now have been raised in this action have taken place over a period of several years and have resulted in the signing by Gulf of a Conciliation Agreement. This agreement, which was entered into by Gulf and the Federal Agencies on April 14, 1976, provided for an award of over $900,000 to 614 present and former black employees and 29 female employees at Gulf's Port Arthur Refinery. A copy of this Conciliation Agreement is attached hereto as Exhibit A.

As soon as the Conciliation Agreement was finalized, Gulf pursuant to the terms of the Conciliation Agreement mailed a letter and release, the form of which was

approved by the Federal Agencies, notifying all employees covered by the Conciliation Agreement that they were entitled to an award of back pay and that upon execution of the receipt and general release the employees would receive the back pay award. Between the time the Conciliation Agreement was executed by Gulf, and the date the summons was served upon Gulf in this action, approximately 452 employees out of a total of 643 employees entitled to a back pay award had executed the receipt and general release and had received their back pay checks.

So as to comply with the letter and spirit of Rule 23 (e), F.R.C.P. and the Canons of Ethics of the Bar Association, Gulf immediately upon service of the summons suspended all further mailings to actual or potential class members and informed all actual or potential class members who called Gulf that no further communications concerning the Conciliation Agreement or the issues raised in the lawsuit could be discussed with them until the Court so orders. Attached hereto as Exhibit B is a copy of the statement which was read to all potential and actual class members who called Gulf inquiring about these matters.

However, on Saturday, May 22, 1976, four days after the Complaint was filed in this action, an attorney for the Plaintiffs, Mr. Ulysses Gene Thibodeaux, appeared before approximately 75 actual or potential class members at a meeting in Port Arthur and discussed with them the issues involved in the case and recommended to those employees that they do not sign the receipt and general release which had been mailed to them pursuant to the Conciliation Agreement. In fact, it is reported to Gulf

that Mr. Thibodeaux advised this group that they should mail back to Gulf the checks they had received since he could recover at least double the amount which was paid to them under the Conciliation Agreement by prosecuting the present lawsuit.

Gulf believes that this action by the Plaintiffs' attorney is indeed a serious breach of the ethical and legal standards which are imposed upon attorneys under the Canons of Ethics and the law. In order to prevent further communications of this type by all parties and their counsel to this suit, Gulf has moved the Court for an order to limit communications with any potential or actual class member to this lawsuit. The order which Gulf proposes be entered pursuant to its Motion is copies verbatim from "Sample Pretrial Order No. 15—Prevention of Potential Abuse of Class Actions" contained in the *Manual for Complex and Multidistrict Litigation*, p. 197. This order is also identical to many local rules of the United States District Courts which have adopted "Suggested Local Rule No. 7—Prevention of Potential Abuse of Class Actions" contained in the *Manual for Complex and Multidistrict Litigation* on p. 196.[1] It should be noted that the *Manual for Complex and Multidistrict Litigation* suggests that such an order be promptly entered in actual and potential class action cases unless there is a parallel local rule.

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1. See Local Rules of the U.S. District Court for the Southern District of Texas, Rule 6; and the General Rules of the U.S. District Court for the Eastern District of Louisiana, Rule 2.12e.

By entering the suggested order, this Court will preserve the status quo of the case until Judge Fisher returns and can assume control and administration of the case. In the absence of such an order, Gulf feels that the unusual circumstances involved in this case, combined with the statements which Plaintiffs' counsel has already made to actual and potential class members, could seriously prejudice Gulf in its defense of this case and the conciliation efforts which have been conducted by the Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior.

CONCLUSION

In accordance with the above stated authorities, Gulf urges the Court to grant its Motion to Limit Communications with any Potential or Actual Class Member.

[Signatures Omitted in Printing]

Exhibit A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Houston District Office
2320 La Branch, Room 1101
HOUSTON, TEXAS 77004

AREA CODE 713
226-5611

CONCILIATION AGREEMENT

In the Matter of:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

Gulf Oil Company—U.S. Charge No. AU68-9-154E
Port Arthur, Texas
Respondent

and

Office for Equal Opportunity
U.S. Department of the Interior
Compliance Agency

* * *

A charge having been filed under Title VII of the Civil Rights Act of 1964, as amended, by a Commissioner of the U. S. Equal Employment Opportunity Commission against the Respondent, the charge having been investigated and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

[Table of Contents Omitted in Printing]

A. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.

2. The U.S. Equal Employment Opportunity Commission hereby waives and releases its cause of action against the Respondent under the instant charge and covenants not to sue the Respondent independently or on behalf of any individual including, but not necessarily limited to, persons listed on Attachments "A" and "B" hereto with respect to any matter alleged thereunder, subject to performance by the Respondent of the promises and representations contained herein.

3. The Respondent understands that the Commission, on its own motion, may review compliance with this Agreement. As a part of such review, the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents pertinent to such review. The Commission agrees that the Respondent reserves all rights and protection afforded by the Freedom of Information Act, as amended.

4. The Respondent reaffirms that all of its hiring, promotion practices, classification, assignments, layoffs and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, religion, sex or national origin in violation

of Title VII of the Civil Rights Act of 1964, as amended.

5. The Respondent agrees that it will not knowingly practice nor permit its supervisory or other personnel to practice discrimination or retaliation of any kind against any person because of his or her opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge, or giving of testimony or assistance, or participation in any manner in any investigation, proceeding, or hearing under Title VII of the Civil Rights Act of 1964, as amended.

6. Recognizing the exception with respect to sex or regards toilets, showers and the like, the Respondent reaffirms that all facilities on the premises or furnished its employees, including recreational opportunities and all other conveniences and services, are available for the use and enjoyment of any employee without regard to race, color, religion, sex or national origin; that there is no discrimination against any employee on said grounds with respect to the use of facilities; and that the notices required to be posted by Title VII of the Civil Rights Act of 1964, as amended, are posted.

B. SETTLEMENT AGREEMENT—BACK PAY

1. Appertaining to back pay, the Affected Class is hereby defined as all Negroes employed by the Respondent on July 2, 1965, whose seniority date antecedes January 1, 1957, and all hourly rated females employed by the Respondent in its Package and Grease Department on July 2, 1965.

2. The Commission agrees that a thorough search has been made to identify all individuals potentially entitled to backpay under this Agreement, that the Respondent's personnel records since the effective date of Title VII of the Civil Rights Act of 1964 have been exhaustively analyzed and that, through examination of documents submitted by the Respondent, no persons potentially entitled other than those listed on Attachments "A" and "B" hereto could be found.

3. For the sake of convenience, the Affected Classes, as shown on Attachments "A" and "B", shall be designated and hereinafter referred to as Group "A" and Group "B" respectively.

4. The Respondent agrees that all individuals identified as belonging to Group "A" or Group "B" shall immediately be awarded upon notification of acceptance as described below, such back pay as is hereinafter provided:

   a. The Respondent represents that it has set aside a sum for purposes of fulfilling all back pay obligations which are or might have been incurred as a result of employment practices complained of in the instant charge or which were treated in the Commission's Letters of Determination or Reconsideration of Determination thereon, including matters found by the Commission to be like and related.

   b. The United States Equal Employment Opportunity Commission concurs that the sum set aside is sufficient to meet the purposes of providing

equitable relief to designated members of Group "A" or Group "B" and stipulates that $35,000.00 of said amount may be reserved and held in a special account by the Respondent for a period of five years. The Commission agrees that, insofar as matters encompassed by this Agreement are raised to issue in the future, the Respondent shall utilize its special account to dispose of contingent liabilities, and that any undispensed funds remaining, after passage of the account's established five year life, shall be returned to the Respondent's general control for unrestricted use.

c. In formulating the specific relief due each individual hereunder credits will be awarded as follows:

(1) To members of Group "A", $5.62 for each month of continuous service with the Respondent prior to January 1, 1957, and $2.81 for each month of continuous service thereafter until date of termination or until January 1, 1971, whichever occurs earlier.

(2) To members of Group "B", $5.62 for each month of continuous service with the Respondent until date of termination or until January 1, 1975, whichever occurs earlier.

d. Back pay awards previously tendered to members of Group "A" under the Respondent's Agreement dated May 7, 1971, with the Office for Equal Opportunity, United States Department of the Interior shall be deducted from amounts hereunder due those same individuals.

e. Back pay awards will be subject to standard deductions for F.I.C.A. and Federal Income Tax Withholding.

f. Upon accepting a back pay award, each Group "A" or Group "B" member will be required to execute a general release to the Respondent for any and all claims against the Respondent as a result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future effects of past or present employment practices.

g. Prior to tendering back pay awards, the Respondent agrees to notify in writing each member belonging to Group "A" or Group "B" that he or she has been so identified, and of the general formula used to calculate awards and of the conditions of waiver or release required in accepting back pay. Each member shall be furnished a form on which to notify the Respondent, within thirty days, whether such member desires to accept or decline back pay consideration. A failure on the part of any member to respond within thirty days shall be interpreted as acceptance of back pay. It is agreed that the form of notification to be utilized shall be reviewed and signed by a Commission representative prior to being implemented or disseminated.

h. In the event that a member of Group "A" or Group "B" is deceased, notice shall be given and payment made to his or her estate. Upon accepting a back pay award, the deceased member's

heir or heirs shall be required to execute a general release as is provided in subsection (f) hereinabove.

i. In the event that a member of Group "A" or Group "B" refuses his or her award, or cannot be located or, if deceased, his heir or heirs cannot be located through the exercise of reasonable effort, his or her back pay award shall be placed in the Respondent's special account as provided in subsection (b) above, to be returned to the Respendent's general control, if unclaimed upon expiration of the account's life.

C. SETTLEMENT AGREEMENT—GOALS AND TIMETABLES

1. a. For Affirmative Action purposes, the Affected Class is hereby defined as all hourly rated females presently employed in the Respondent's Package and Grease Department whose seniority date antecedes April 5, 1974 and all members of back pay Group "A" who are presently employed in the classification of Operator Helper No. 1, Boiler Washer "X", Brander "X", Operator Helper No. 2, Utility Helper or Laborer.

b. For the sake of convenience, the Affected Class for Affirmative Action purposes shall be designated and hereinafter referred to as Group "C".

2. The Respondent, firm in its commitment to act in good faith and compliance with Title VII of the Civil Rights Act of 1964, as amended, has conducted a thorough analysis of its work force and has,

as of January 1, 1976, identified those classifications wherein Negroes, Spanish Surnamed Americans and/or females are statistically underrepresented. Said classifications, designated and hereinafter referred to as "Target Classifications," are as follows:

a. Analytical Tester
b. Area Storehouseman
c. Boiler Fireman
d. Boilermaker
e. Bricklayer
f. Carpenter
g. Clerical
h. Compounder No. 1
i. Craft Apprentice and Trainee
j. Dockman
k. Electrician
l. Garage Mechanic
m. Gas Dispatcher
n. Greasemaker No. 1
o. Greasemaker No. 2
p. Instrument Man
q. Insulator
r. Lineman
s. Machinist
t. Operator No. 1
u. Operator No. 2
v. Assistant Operator
w. Painter
x. Pipefitter
y. Power Plant Engineer No. 1
z. Power Plant Engineer No. 2

aa. Power Plant Operator
bb. Pumper No. 1
cc. Pumper No. 2
dd. Railroad Craft Group
ee. Receiving Room Man
ff. Treater No. 1
gg. Treater No. 2
hh. Tinner
ii. Treater Helper No. 1
jj. Troubleman
kk. Water Pumper No. 2
ll. Water Tender
mm. Water Treater No. 1
nn. Water Treating Plant Operator
oo. Welder
pp. EEO-1 Technician Category
qq. EEO-1 Professional Category
rr. EEO-1 Official and Manager Category

3. With respect to the Respondent implementing its Affirmative Action Program as provided herein, the Commission stipulates that:

   a. Ratios shall not be fixed but shall serve solely as general measures of the Respondent's satisfactory progress hereunder.

   b. Although it is assumed and expected that minority and female placement within the above listed "Target Classifications" will be evenly distributed, the Respondent will not be faulted if it fails to meet its goals and timetables in one or more classifications as long as its overall progress is satisfactory.

c. The Respondent shall not be restricted to selection of Group "C" Affected Class members in meeting its goals and timetables, but may, at its discretion, select other qualified Negro, Spanish Surnamed American or female employees, or recruit from outside its workforce, thereby equally satisfying Affirmative Action commitments.

d. Failure by the Respondent to meet its goals and timetables hereunder shall not serve as justification to increase or renegotiate backpay as provided in Section B.

4. Considering the above, the Respondent agrees to establish a goal to fill one of every five vacancies in "Target Classifications" other than its EEO-1 Official and Manager Category, wherein the ratio shall be one of every seven, with a Negro, a Spanish Surnamed American or a female until such time as their respective representation jointly within said classifications equals or exceeds their joint representation throughout the Respondent's workforce.

5. On occasions when a vacancy is to be filled with a Group "C" member, the Respondent will fill it by selecting the bidder having greatest seniority, subject to relative skills, abilities, and qualifications, and provided that the Respondent's initial entry requirements are met.

6. Group "C" members upgrading hereunder shall be classified as provisional and shall be on trial for a period not to exceed 120 days. They will receive the same training and orientation given other employees, and, if qualifying according to normal

company competency standards, the provisional title shall be dropped. The Respondent may make its determination prior to expiration of the full 120 day period. An employee determined by the Respondent not to be qualified for the job for which he or she has been on trial shall be returned to his or her former classification without loss of seniority. Determination that any employee has qualified hereunder shall not bind the Respondent to accept the employee for any other classification, but such employee shall be judged at each level in the same manner as other employees. An upgraded Group "C" member may disqualify himself or herself during the 120 day trial period and, in that event, shall be returned to his or her former classification with uninterrupted seniority.

7. Each upgraded Group "C" member shall have his or her seniority date determined by applicable collective bargaining agreement provisions, with the exception that in the event of a reduction in force or layoff, any Group "C" member who has upgraded to a Clerical classification or to a Classification represented by the United Transportation Union; the Bricklayers, Masons and Plasters International Union Local No. 13; the International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; or the International Brother of Electrical Workers, AFL-CIO, Local Union No. 390 shall have bumpback rights into the Operator Helper No. 2 pool or into the classification of Utility Helper or Laborer, according to his or her former seniority at the time upgraded. The

Respondent shall retain the right to select into which of the above three classifications the affected Group "C" member shall be placed. Each Group "C" member so displaced shall continue to hold rights to recall into his or her craft position from which displaced, as though he or she had not bumped back.

8. The Respondent agrees that the rate of pay for each upgraded Group "C" member shall be the higher of his or her permanent rate at the time upgraded or the appropriate new rate. This provision shall not apply in the event that a Group "C" member bids into a classification in which the top rate for the new line of progression is less than his or her former rate.

9. Each member of Group "C" who participates in this special program shall receive one bona fide opportunity to upgrade. Such opportunity shall be satisfied, and the employee's rights hereunder shall terminate, when the employee either (a) takes a job and qualifies therefor, (b) takes a job and fails to qualify or requests to return to his or her former job classification or (c) declines an offer to upgrade. Group "C" members who resign from employment with the Respondent shall have no further rights hereunder.

10. An upgraded employee's failure to qualify during the established trial period, or a declination of a job offer made to an employee by the Respondent, shall not satisfy that particular exercise of the Respondent's obligation under established ratios to-

ward goals and timetables, and such opportunity shall be extended to another individual.

11. Notwithstanding any of the foregoing, the Respondent shall not be required to place or retain any person in a job who does not have the skill, ability and qualifications to perform said job.

12. The United States Equal Employment Opportunity Commission and the Respondent remain in disagreement as to the Respondent's continued use of test battery results for employment and promotion purposes. However, in order to provide a means to resolve those matters held in dispute, the Commission agrees that the Respondent reserves the right to utilize test scores along with other job related criteria in assessing individual qualifications. In consideration therefore, the Respondent represents that it shall not rely upon test scores as justification for its failure to meet goals and timetables in any job classification.

D. AFFIRMATIVE ACTION

The Respondent agrees to refine and strengthen on a continuing basis positive and objective nondiscriminatory employment standards, procedures and practices and represents that in its business operations it exerts continuing effort to uniformly apply such standards, practices, and procedures in a manner which will assure equal employment opportunities in all aspects of its total work force and operations without regard to race, color, religion, sex or national origin.

E. COMMISSION ASSERTION AND REPORTING REQUIREMENTS

1. The Equal Employment Opportunity Commission agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur, Texas Refinery.

2. Six months after the date of approval of this Agreement and every six months thereafter for its established life of five years, the Respondent shall send to the Commission a written report concerning all actions encompassed by the provisions hereinabove set forth, Such reports shall accurately, fully and clearly describe the nature of the remedial and affirmative action undertaken and shall be submitted to the District Director, Equal Employment Opportunity Commission, 2320 LaBranch, Room 1101, Houston, Texas 77004 with a copy submitted to the Regional Manager, Office for Equal Opportunity, Department of the Interior, Denver Federal Center, Building 67, Room 880, Denver, Colorado 80225.

F. SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained herein:

4/14/76

MERLIN BREAUX
Gulf Oil Company—U.S.
Port Arthur, Texas
Respondent

I recommend approval of this Conciliation Agreement:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

I concur in the above recommendation for approval of this Conciliation Agreement:

4/14/76 CARL D. HANLEY
Supervisory Equal Opportunity Specialist (E)

Approved on behalf of the Commission:

4/14/76 HERBERT C. McCLEES
Herbert C. McClees
District Director

G. CERTIFICATE OF REVIEW AND APPROVAL

1. This is to certify on behalf of the Office of Equal Opportunity, United States Department of the Interior, review and approval of the foregoing conciliation agreement by and between the U. S. Equal Employment Opportunity Commission and Gulf Oil Company—U.S., Port Arthur, Texas.

2. It is agreed that the Respondent has complied with all of the provisions of the letter agreement between Edward E. Shelton, Director of Office for Equal Opportunity, United States Department of the Interior and L. R. Johnston, Vice President, Employee Relations, Gulf Oil Company—U.S. dated

May 7, 1971 and all points have been resolved to the complete satisfaction of the Office for Equal Opportunity, United States Department of the Interior with the single exception of a portion of paragraph 2e. "Free Bidding—Non-Related Jobs" in said agreement.

With regard to such paragraph, vacancies in the following jobs will be posted for bid to present employees in Group "B":

Checker	Wax Packaging House—Pump House 78 (Lubricating)
Checker	Drum Filling and Loading (Package and Grease)
Fire Assistant	Maintenance Division
Truck Driver	Maintenance Division
Bathhouse Attendant	Maintenance Division

3. Should a bidding employee in Group "B" be senior to the employee who would receive the job through normal promotional procedures, such employee should be awarded the job. In addition, should her present rate be greater than the posted job in question, she should retain her present rate and also should have the option of returning to her former position within a thirty-day period. Other members of the "affected class" shall not have such bidding rights.

4. The Office for Equal Opportunity, Department of the Interior agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Executive Order 11246, as amended, at its Port Arthur, Texas Refinery.

5. The Respondent recognizes that it has a continuing obligation for Affirmative Action under Executive Order 11246, as amended, and the implementing regulations of the Department of Labor.

4/14/76 GERALD C. WILLIAMS
Gerald C. Williams
Western Regional Manager

Reviewed:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

Approved on behalf of the United States Equal Employment Opportunity Commission:

4/14/76 LORENZO D. COLE
Lorenzo D. Cole
Deputy Director

EXHIBIT A—List of Employees (Omitted)

EXHIBIT B—List of Employees (Omitted)

EXHIBIT B

May 25, 1976

I am required to make the following statement by Gulf's Law Department. Since 6 individuals have filed a class action suit against Gulf Oil Corporation and the Union alleging discrimination exists at this plant and since you are a potential plaintiff in that suit, Gulf must suspend—pending the court's order—all further mailing of checks and all further contacts with you concerning the payment of money under the EEOC agreement. We regret this situation deeply; but due to the suit, we cannot proceed further until the court so orders.

Wm. G. DUCK
Wm. G. Duck

WGD/am

ORDER

[Caption Omitted in printing]

Filed May 28, 1976

Having considered the Motion by the Defendant, Gulf Oil Corporation, to limit communications with any potential or actual class member;

IT IS ORDERED that, in this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order shall be effective until Judge Fisher returns and can hear the matter upon formal motion.

Counsel for defendant, Gulf Oil Corporation, shall present a motion on this matter to Judge Fisher as soon as possible upon Judge Fisher's return.

Date: May 28, 1976

/s/ WILLIAM M. STEGER
United States District Judge

MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

Filed June 8, 1976

Comes now Gulf Oil Corporation (Gulf), a Defendant in the above-styled case, and it moves this Court for an order modifying Judge Steger's Order dated May 28, 1976, and filed of record in this case on the same date, to allow Gulf to comply with the terms of the Conciliation Agreement dated April 14, 1976, and signed by Gulf, the Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior, by resuming under the Court's supervision the payment of back pay awards to employees covered by the Conciliation Agreement and obtaining from those employees receipts and releases all as provided for by the terms of the Conciliation Agreement. In support of this Motion, Gulf has attached a Memorandum of Points and Authorities.

[Signatures Omitted in Printing]

[Certificate of Service Omitted]

MEMORANDUM IN SUPPORT OF GULF OIL CORPORATION'S MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

Filed June 8, 1976

This is a class action suit brought by six individual employees of Gulf's Port Arthur Refinery alleging that they have been victims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The suit was filed on May 18, 1976, and Gulf was served with a summons on May 24, 1976.

Four days after the suit was filed and prior to the time Gulf was served with the summons in this case, attorneys for the Plaintiffs appeared at a meeting of approximately 75 actual or potential class members in Port Arthur and discussed with them the issues involved in the case and recommended to those employees that they support the present suit. In addition, it was reported to Gulf that Mr. Ulysses Gene Thibodeaux, an attorney for the Plaintiffs, recommended to those employees that they do not sign the receipt and release which had been mailed to the employees as a result of a Conciliation Agreement entered into by Gulf, the U.S. Equal Employment Opportunity Commission (EEOC) and the Office for Equal Opportunity, U.S. Department of the Interior (OEO). In fact, it is reported that Mr. Thibodeaux stated that even if the employee had signed the receipt and release, he should now return the check which had been mailed to the employee by Gulf.

As a result of this activity by the Plaintiffs' attorney, Gulf on May 28, 1976, filed a Motion to Limit Communications with any Potential or Actual Class Member and brought the Motion on for hearing before The Honorable William M. Steger. Judge Steger agreed to hear the matter in the absence of The Honorable Joe J. Fisher so that the status quo of the case could be preserved until Judge Fisher returned. After hearing argument of counsel for both the Plaintiffs and Defendant Gulf, Judge Steger entered an order which was made applicable to all parties and forbid all parties and their attorneys from communicating with actual or potential class members who were not formal parties to the action. In addition, Judge Steger ordered that the Defendant Gulf present a motion on this matter to Judge Fisher as soon as possible upon Judge Fisher's return. In order to comply with Judge Steger's order, Gulf has filed this Motion to Modify so that the matter may be heard by Judge Fisher.

The purpose of the Motion to Modify is to allow Gulf, the EEOC, and the OEO to proceed under the terms of a Conciliation Agreement dated April 14, 1976 (attached hereto as Exhibit A). The Conciliation Agreement which has been negotiated between Gulf and the Federal agencies over a period of eight years was an effort by Gulf to settle the very issues which now have been raised in this eleventh hour lawsuit. The Conciliation Agreement provided for an award of over $900,000 to 616 Negro employees and approximately 29 female employees at Gulf's Port Arthur Refinery.

As soon as the Conciliation Agreement was finalized, Gulf pursuant to the terms of the Agreement mailed a letter and release, the form of which was approved by

the Federal agencies, notifying all employees covered by the Agreement that they were entitled to an award of back pay and that upon execution of the receipt and release the employees would receive the back pay award. Between the time the Conciliation Agreement was executed by Gulf and the date the summons was served upon Gulf in this action, approximately 452 employees out of a total of 643 employees entitled to a back pay award under the Agreement had executed the receipt and release and had received their back pay checks.

So as to comply with the letter and spirit of Rule 23(a), F.R.C.P. and the Canons of Ethics of the Bar Association, Gulf immediately upon service of the summons suspended all further mailings to actual or potential class members and informed all actual or potential class members who called Gulf that no further communications concerning the Conciliation Agreement or the issues raised in the lawsuit could be discussed with them until the Court so orders. Attached hereto as Exhibit B is a copy of a statement which was read to all potential and actual class members who called Gulf inquiring about these matters. In accordance with Judge Steger's Order, Gulf has continued to suspend the payment of back pay awards and the acceptance of receipts and releases from employees who are actual or potential class members.

So that Gulf may fulfill the terms of the Conciliation Agreement, it has moved this Court for an order to modify Judge Steger's previous Order so that it may proceed to make the back pay awards pursuant to the terms of the Conciliation Agreement. It is felt that the rights of all parties will be fully protected if the Court exercises its judicial control over the procedures whereby

potential or actual class members not formal parties to this suit are contacted with regard to the terms of the Conciliation Agreement. In that regard, Gulf proposes that the Court order that the Clerk mail a letter to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back awards informing them that they have 45 days from the date of receipt of the letter to accept the offer of settlement as contained in the Conciliation Agreement and if such offer is not accepted within that time period, the offer will expire until further notice of the Court. Since the affected employees already have received notices informing them of the terms of the Conciliation Agreement and enclosing the receipt and release the Court's order setting a time limit for acceptance of the offer would now be appropriate. During the 45 day time period in which the actual or potential class members are deciding whether or not to accept the offer under the Conciliation Agreement the parties to this lawsuit and their counsel should be forbidden to contact those individuals so that they might make their own independent decision concerning the acceptance of the back pay award.

The two Federal agencies who have been involved with this matter for over eight years and who have protected the rights of the individual employees support Gulf's position that the terms of the Conciliation Agreement should be carried out by allowing Gulf to proceed with the payment of back pay awards. Mr. Herbert C. McClees, who is the District Director of the EEOC in Houston and whose office was involved with the negotiation of the Conciliation Agreement, states in his affidavit that

he believes the issues and relief sought by the Plaintiffs in this case are almost identical to the issues which were resolved under the terms of the Conciliation Agreement. In addition, he states that he feels that the Conciliation Agreement is a "fair, equitable, thorough and comprehensive solution to the charges that Gulf has discriminated at its Port Arthur Refinery in violation of Title VII of the Civil Rights Act of 1964" (see page 4 of Affidavit of Herbert C. McClees attached hereto as Exhibit C). Mr. Gerald C. Williams, Western Regional Manager of the OEO in Lakewood, Colorado, whose office was responsible for negotiating the Conciliation Agreement on behalf of the Department of the Interior, supports Mr. McClees' belief that Gulf should be allowed to continue to fulfill the terms of the Conciliation Agreement. (See Affidavit of Mr. Williams attached hereto as Exhibit D.)

Gulf's request to modify Judge Steger's Order to allow the payment of back pay awards under the Conciliation Agreement is consistent with the provisions of Rule 23(e) which states: "A class action shall not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs." The Courts have been consistent in their ruling that a defendant in a class action suit may negotiate settlements with potential or actual class members who are not formal parties to the action. *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2nd Cir. 1972). However, the courts have been anxious to protect the rights of unsophisticated potential class members by exercising judicial control over the manner in which settlement proposals are com-

municated to those class members. In *American Finance System, Inc., v. Harlow,* 65 F.R.D. 572 (D. Md. 1974) the court did allow precertification communications between the named parties and the prospective class members only within the strict limits delineated by a memorandum and order from the court. In that case, the court allowed the defendants to send a notice of proposed settlement to all potential class members and allowed the potential class members 35 days from the date of receipt of the order to accept or reject the proposed offer. However, all further communications other than those permitted by the notice between the named parties, their representatives or counsel and the potential class members were forbidden by the court. *Harlow, supra.* at 577. The plaintiffs in the *Harlow* case stated that such a limitation on communications was in violation of the First Amendment to the United States Constitution and would violate Rule 23(e) since a settlement by potential class members would have the effect of destroying the numerosity requirement under Rule 23(a). However, the court dismissed these arguments by saying:

> "Counterbalancing these considerations is the danger that the class action vehicle will be eviscerated by violators of the civil rights acts who are able to convince legally unsophisticated class members that their claims are unlikely to succeed. Even in *Weight Watchers,* a class not involving a civil rights act, the lower court required that counsel for each franchisee be present during the discussion and that counsel for the class representative be given five days notice of such negotiations, 55 F.R.D. 50 (1971). Given this judicial concern in the guidelines of the *Manual For Complex and Multidistrict Litigation,* the court will only permit AFS to send a

> neutrally worded notice of settlement containing no more than the terms of the proposed compromise, the position of both parties and a copy of this memorandum and order. If the potential class member affirmatively rejects the offer or fails to answer within 30 days, the court will assume that he wishes the action to proceed to judgment." *Harlow, supra.* at 576.

The instant case provides the maximum protection for unsophisticated class members since the two Federal agencies have been involved in detailed negotiations for a period of eight years in their attempts to settle the charges that Gulf has discriminated in violation of Title VII at its Port Arthur Refinery. Since the potential class members' rights have been protected by the Federal agencies, it is felt that the Court should allow Gulf to proceed with the payment of back pay awards to the potential class members.

Conclusion

In view of the above stated authorities, Gulf's Motion to Modify should be granted.

[Signatures Omitted in Printing]

CONCILIATION AGREEMENT

Exhibit A

[Caption Omitted in Printing]

* * *

A charge having been filed under Title VII of the Civil Rights Act of 1964, as amended, by a Commissioner of the U. S. Equal Employment Opportunity Commission against the Respondent, the charge having been investigated and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

[Table of Contents Omitted in Printing]

A. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.

2. The U. S. Equal Employment Opportunity Commission hereby waives and releases its cause of action against the Respondent under the instant charge and covenants not to sue the Respondent independently or on behalf of any individual including, but not necessarily limited to, persons listed on Attachments "A" and "B" hereto with respect to any matter alleged thereunder, subject to performance by the Respondent of the promises and representations contained herein.

3. The Respondent understands that the Commission, on its own motion, may review compliance with this Agreement. As a part of such review, the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents pertinent to such review. The Commission agrees that the Respondent reserves all rights and protection afforded by the Freedom of Information Act, as amended.

4. The Respondent reaffirms that all of its hiring, promotion practices, classification, assignments, layoffs and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, religion, sex or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended.

5. The Respondent agrees that it will not knowingly practice nor permit its supervisory or other personnel to practice discrimination or retaliation of any kind against any person because of his or her opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge, or giving of testimony or assistance, or participation in any manner in any investigation, proceeding, or hearing under Title VII of the Civil Rights Act of 1964, as amended.

6. Recognizing the exception with respect to sex as regards toilets, showers and the like, the Respondent reaffirms that all facilities on the premises or furnished its employees, including recreational op-

portunities and all other conveniences and services, are available for the use and enjoyment of any employee without regard to race, color, religion, sex or national origin; that there is no discrimination against any employee on said grounds with respect to the use of facilities; and that the notices required to be posted by Title VII of the Civil Rights Act of 1964, as amended, are posted.

B. SETTLEMENT AGREMENT—BACK PAY

1. Appertaining to back pay, the Affected Class is hereby defined as all Negroes employed by the Respondent on July 2, 1965, whose seniority date antecedes January 1, 1957, and all hourly rated females employed by the Respondent in its Package and Grease Department on July 2, 1965.

2. The Commission agrees that a thorough search has been made to identify all individuals potentially entitled to backpay under this Agreement, that the Respondent's personnel records since the effective date of Title VII of the Civil Rights Act of 1964 have been exhaustively analyzed and that, through examination of documents submitted by the Respondent, no persons potentially entitled other than those listed on Attachments "A" and "B" hereto could be found.

3. For the sake of convenience, the Affected Classes, as shown on Attachments "A" and "B", shall be designated and hereinafter referred to as Group "A" and Group "B" respectively.

4. The Respondent agrees that all individuals identified as belonging to Group "A" or Group "B"

shall immediately be awarded upon notification of acceptance as described below, such back pay as is hereinafter provided:

a. The Respondent represents that it has set aside a sum for purposes of fulfilling all back pay obligations which are or might have been incurred as a result of employment practices complained of in the instant charge or which were treated in the Commission's Letters of Determination or Reconsideration of Determination thereon, including matters found by the Commission to be like and related.

b. The United States Equal Employment Opportunity Commission concurs that the sum set aside is sufficient to meet the purposes of providing equitable relief to designated members of Group "A" or Group "B" and stipulates that $35,000.00 of said amount may be reserved and held in a special account by the Respondent for a period of five years. The Commission agrees that, insofar as matters encompassed by this Agreement are raised to issue in the future, the Respondent shall utilize its special account to dispose of contingent liabilities, and that any undispensed funds remaining, after passage of the account's established five year life, shall be returned to the Respondent's general control for unrestricted use.

c. In formulating the specific relief due each individual hereunder credits will be awarded as follows:

(1) To members of Group "A", $5.62 for each month of continuous service with the Re-

spondent prior to January 1, 1957, and $2.81 for each month of continuous service thereafter until date of termination or until January 1, 1971, whichever occurs earlier.

(2) To members of Group "B", $5.62 for each month of continuous service with the Respondent until date of termination or until January 1, 1975, whichever occurs earlier.

d. Back pay awards previously tendered to members of Group "A" under the Respondent's Agreement dated May 7, 1971, with the Office for Equal Opportunity, United States Department of the Interior shall be deducted from amounts hereunder due those same individuals.

e. Back pay awards will be subject to standard deductions for F.I.C.A. and Federal Income Tax Withholding.

f. Upon accepting a back pay award, each Group "A" or Group "B" member will be required to execute a general release to the Respondent for any and all claims against the Respondent as a result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future effects of past or present employment practices.

g. Prior to tendering back pay awards, the Respondent agrees to notify in writing each member belonging to Group "A" or Group "B" that he or she has been so identified, and of the general formula used to calculate awards and of the conditions of waiver or release required in ac-

cepting back pay. Each member shall be furnished a form on which to notify the Respondent, within thirty days, whether such member desires to accept or decline back pay consideration. A failure on the part of any member to respond within thirty days shall be interpreted as acceptance of back pay. It is agreed that the form of notification to be utilized shall be reviewed and signed by a Commission representative prior to being implemented or disseminated.

h. In the event that a member of Group "A" or Group "B" is deceased, notice shall be given and payment made to his or her estate. Upon accepting a back pay award, the deceased member's heir or heirs shall be required to execute a general release as is provided in subsection (f) hereinabove.

i. In the event that a member of Group "A" or Group "B" refuses his or her award, or cannot be located or, if deceased, his heir or heirs cannot be located through the exercise of reasonable effort, his or her back pay award shall be placed in the Respondent's special account, as provided in subsection (b) above, to be returned to the Respondent's general control, if unclaimed upon expiration of the account's life.

C. SETTLEMENT AGREEMENT—GOALS AND TIMETABLES

1. a. For Affirmative Action purposes, the Affected Class is hereby defined as all hourly rated females presently employed in the Respondent's

Package and Grease Department whose seniority date antecedes April 5, 1974 and all members of back pay Group "A" who are presently employed in the classification of Operator Helper No. 1; Boiler Washer "X", Brander "X", Operator Helper No. 2, Utility Helper or Laborer.

b. For the sake of convenience, the Affected Class for Affirmative Action purposes shall be designated and hereinafter referred to as Group "C".

2. The Respondent, firm in its commitment to act in good faith and compliance with Title VII of the Civil Rights Act of 1964, as amended, has conducted a thorough analysis of its work force and has, as of January 1, 1976, identified those classifications wherein Negroes, Spanish Surnamed Americans and/or females are statistically underrepresented. Said classifications, designated and hereinafter referred to as "Target Classifications," are as follows:

   a. Analytical Tester
   b. Area Storehouseman
   c. Boiler Fireman
   d. Boilermaker
   e. Bricklayer
   f. Carpenter
   g. Clerical
   h. Compounder No. 1
   i. Craft Appentice and Trainee
   j. Dockman
   k. Electrician
   l. Garage Mechanic
   m. Gas Dispatcher
   n. Greasemaker No. 1

o. Greasemaker No. 2
p. Instrument Man
q. Insulator
r. Lineman
s. Machinist
t. Operator No. 1
u. Operator No. 2
v. Assistant Operator
w. Painter
x. Pipefitter
y. Power Plant Engineer No. 1
z. Power Plant Engineer No. 2
aa. Power Plant Operator
bb. Pumper No. 1
cc. Pumper No. 2
dd. Railroad Craft Group
ee. Receiving Room Man
ff. Treater No. 1
gg. Treater No. 2
hh. Tinner
ii. Treater Helper No. 1
jj. Troubleman
kk. Water Pumper No. 2
ll. Water Tender
mm. Water Treater No. 1
nn. Water Treating Plant Operator
oo. Welder
pp. EEO-1 Technician Category
qq. EEO-1 Professional Category
rr. EEO-1 Official and Manager Category

3. With respect to the Respondent implementing its Affirmative Action Program as provided herein, the Commission stipulates that:

a. Ratios shall not be fixed but shall serve solely as general measures of the Respondent's satisfactory progress hereunder.

b. Although it is assumed and expected that minority and female placement within the above listed "Target Classifications" will be evenly distributed the Respondent will not be faulted if it fails to meet its goals and timetables in one or more classifications as long as its overall progress is satisfactory.

c. The Respondent shall not restricted to selection of Group "C" Affected Class members in meeting its goals and timetables, but may, at its discretion, select other qualified Negro, Spanish Surnamed American or female employees, or recruit from outside its workforce, thereby equally satisfying Affirmative Action commitments.

d. Failure by the Respondent to meet its goals and timetables hereunder shall not serve as justification to increase or renegotiate backpay as provided in Section B.

4. Considering the above, the Respondent agrees to establish a goal to fill one of every five vacancies in "Target Classifications" other than its EEO-1 Official and Manager Category, wherein the ratio shall be one of every seven, with a Negro, a Spanish Surnamed American or a female until such time as their respective representation jointly within said classifications equals or exceeds their joint representation throughout the Respondent's workforce.

5. On occasions when a vacancy is to be filled with a Group "C" member, the Respondent will fill it by

selecting the bidder having greatest seniority, subject to relative skills, abilities, and qualifications, and provided that the Respondent's initial entry requirements are met.

6. Group "C" members upgrading hereunder shall be classified as provisional and shall be on trial for a period not to exceed 120 days. They will receive the same training and orientation given other employees, and, if qualifying according to normal company competency standards, the provisional title shall be dropped. The Respondent may make its determination prior to expiration of the full 120 day period. An employee determined by the Respondent not to be qualified for the job for which he or she has been on trial shall be returned to his or her former classification without loss of seniority. Determination that any employee has qualified hereunder shall not bind the Respondent to accept the employee for any other classification, but such employee shall be judged at each level in the same manner as other employees. An upgraded Group "C" member may disqualify himself or herself during the 120 day trial period and, in that event, shall be returned to his or her former classification with uninterrupted seniority.

7. Each upgraded Group "C" member shall have his or her seniority date determined by applicable collective bargaining agreement provisions, with the exception that in the event of a reduction in force or layoff, any Group "C" member who has upgraded to a Clerical classification or to a classification represented by the United Transportation Union; the Bricklayer, Mason and Plasters Inter-

national Union Local No. 13; the International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; or the International Brother of Electrical Workers, AFL-CIO, Local Union No. 390 shall have bumpback rights into the Operator Helper No. 2 pool or into the classification of Utility Helper or Laborer, according to his or her former seniority at the time upgraded. The Respondent shall retain the right to select into which of the above three classifications the affected Group "C" member shall be placed. Each Group "C" member so displaced shall continue to hold rights to recall into his or her craft position from which displaced, as though he or she had not bumped back.

8. The Respondent agrees that the rate of pay for each upgraded Group "C" member shall be the higher of his or her permanent rate at the time upgraded or the appropriate new rate. This provision shall not apply in the event that a Group "C" member bids into a classification in which the top rate for the new line of progression is less than his or her former rate.

9. Each member of Group "C" who participates in this special program shall receive one bona fide opportunity to upgrade. Such opportunity shall be satisfied, and the employee's rights hereunder shall terminate, when the employee either (a) takes a job and qualifies therefor, (b) takes a job and fails to qualify or requests to return to his or her former job classification or (c) declines an offer to upgrade. Group "C" members who resign from em-

ployment with the Respondent shall have no further rights hereunder.

10. An upgraded employee's failure to qualify during the established trial period, or a declination of a job offer made to an employee by the Respondent, shall not satisfy that particular exercise of the Respondent's obligation under established ratios toward goals and timetables, and such opportunity shall be extended to another individual.

11. Notwithstanding any of the foregoing, the Respondent shall not be required to place or retain any person in a job who does not have the skill, ability and qualifications to perform said job.

12. The United States Equal Employment Opportunity Commission and the Respondent remain in disagreement as to the Respondent's continued use of test battery results for employment and promotion purposes. However, in order to provide a means to resolve those matters held in dispute, the Commission agrees that the Respondent reserves the right to utilize test scores along with other job related criteria in assessing individual qualifications. In consideration therefore, the Respondent represents that it shall not rely upon test scores as justification for its failure to meet goals and timetables in any job classification.

D. AFFIRMATIVE ACTION

The Respondent agrees to refine and strengthen on a continuing basis positive and objective nondiscriminatory employment standards, procedures and practices and represents that in its business operations it exerts continu-

ing effort to uniformly apply such standards, practices, and procedures in a manner which will assure equal employment opportunities in all aspects of its total work force and operations without regard to race, color, religion, sex or national origin.

E. COMMISSION ASSERTION AND REPORTING REQUIREMENTS

1. The Equal Employment Opportunity Commission agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur, Texas Refinery.

2. Six months after the date of approval of this Agreement and every six months thereafter for its established life of five years, the Respondent shall send to the Commission a written report concerning all actions encompassed by the provisions hereinabove set forth.

   Such reports shall accurately, fully and clearly describe the nature of the remedial and affirmative action undertaken and shall be submitted to the District Director, Equal Employment Opportunity Commission, 2320 LaBranch, Room 1101, Houston, Texas 77004 with a copy submitted to the Regional Manager, Office for Equal Opportunity, Department of the Interior, Denver Federal Center, Building 67, Room 880, Denver, Colorado 80225.

F. SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained herein:

4/14/76 MERLIN BREAUX
Gulf Oil Company—U. S.
Port Arthur, Texas
Respondent

I recommend approval of this Conciliation Agreement:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

I concur in the above recommendation for approval of this Conciliation Agreement:

4/14/76 CARL D. HANLEY
Supervisory Equal Opportunity
Specialist (E)

Approved on behalf of the Commission:

4/14/76 HERBERT C. McCLEES
Herbert C. McClees
District Director

G. CERTIFICATE OF REVIEW AND APPROVAL

1. This is to certify on behalf of the Office of Equal Opportunity, United States Department of the Interior, review and approval of the foregoing conciliation agreement by and between the U.S. Equal Employment Opportunity Commission and Gulf Oil Company—U. S., Port Arthur, Texas.

2. It is agreed that the Respondent has complied with all of the provisions of the letter agreement between Edward E. Shelton, Director of Office for Equal

Opportunity, United States Department of the Interior and L. R. Johnston, Vice President, Employee Relations, Gulf Oil Company—U. S. dated May 7, 1971 and all points have been resolved to the complete satisfaction of the Office for Equal Opportunity, United States Department of the Interior with the single exception of a portion of paragraph 2 e. "Free Bidding—Non-Related Jobs" in said agreement.

With regard to such paragraph, vacancies in the following jobs will be posted for bid to present employees in Group "B":

Checker	Wax Packing House— Pump House 78 (Lubricating)
Checker	Drum Filling and Loading (Package and Grease)
Fire Assistant	Maintainance Division
Truck Driver	Maintainance Division
Bathhouse Attendant	Maintainance Division

3. Should a bidding employee in Group "B" be senior to the employee who would receive the job through normal promotional procedures, such employee should be awarded the job. In addition, should her present rate be greater than the posted job in question, she should retain her present rate and also should have the option of returning to her former position within a thirty-day period. Other members of the "affected class" shall not have such bidding rights.

4. The Office for Equal Opportunity, Department of the Interior agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Executive Order 11246, as amended, at its Port Arthur, Texas Refinery.

5. The Respondent recognizes that it has a continuing obligation for Affirmative Action under Executive Order 11246, as amended, and the implementing regulations of the Department of Labor.

4/14/76 G. C. WILLIAMS
Gerald C. Williams
Western Regional Manager

Reviewed:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

Approved on behalf of the United States Equal Employment Opportunity Commission:

4/14/76 LORENZO D. COLE
Lorenzo D. Cole
Deputy Director

[Exhibit A—List of Employees (Omitted)]

[Exhibit B—List of Employees (Omitted)]

Exhibit B

May 25, 1976

I am required to make the following statement by Gulf's Law Department. Since 6 individuals have filed a class action suit against Gulf Oil Corporation and the Union alleging discrimination exists at this plant and since you are a potential plaintiff in that suit, Gulf must suspend—pending the court's order—all further mailing of checks and all further contacts with you concerning the payment of money under the EEOC agreement. We regret this situation deeply; but due to the suit, we cannot proceed further until the court so orders.

Wm. G. DUCK
Wm. G. Duck

WGD/am

Exhibit C

AFFIDAVIT OF HERBERT C. McCLEES

[Caption Omitted in Printing]

STATE OF TEXAS
COUNTY OF HARRIS

Herbert C. McClees, being duly sworn, deposes and says:

1. I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of District Director.

2. In my position as District Director, I am charged with directing all activities of the Commission for the twenty-six county area surrounding Houston, Texas, including the counties of Jefferson and Orange. Within this geographic area I have the authority, as vested in me by the EEOC, to investigate charges which have been filed against individuals under Title VII of the Civil Rights Act of 1964, as amended. In addition, I have the authority to enter into a Conciliation Agreement settling the charges against the individual when the facts and circumstances of a particular case so dictates. In most cases, after a charge has been filed with the EEOC an employee under my direction and supervision investigates the charge to determine whether or not reasonable cause exists to believe that the act has been violated. If the in-

vestigator finds reasonable cause to believe the act has been violated, the EEOC attempts to settle all differences by entering into a Conciliation Agreement which in some cases will provide for an award of back pay to the affected employees and an affirmative action program to ensure continued compliance with Title VII.

3. I have read and am familiar with the Complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, styled: *Wesley P. Bernard, et al v. Gulf Oil Company, et al,* Civil Action No. B-76-183-CA (hereinafter referred to as "the suit"). The Complaint was brought by six employees of Gulf Oil Corporation (hereinafter referred to as "Gulf") at its Port Arthur Refinery against Gulf and the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. In their complaint these individuals have alleged that Gulf and the Union have discriminated against them in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. Of the six employees who filed this action, three have filed charges with the EEOC, while three have failed to file charges with the EEOC. Of the three employees who have filed charges, two have requested right to sue letters be issued, which requests are presently being processed. The issues raised in the Complaint are almost identical to those issues which were investigated by the EEOC and which were the subject of a Conciliation Agreement signed April 14, 1976 by Gulf, the EEOC and the Office for Equal Opportunity, U. S. Department of Interior (OEO). The Conciliation Agreement specifically provides that the Agreement does not constitute an admission by Gulf of any violation of Title VII of the Civil Rights Act of 1964, as amended.

4. The charges which have been raised in the suit have been the subject of an EEOC investigation which has been conducted over the past eight years. During this time interval, the EEOC, among other things, interviewed employees of Gulf at its Port Arthur Refinery; examined all relevant documents and business records of Gulf; conducted on-site investigations at Gulf's Port Arthur Refinery; and held numerous meetings with Gulf's executives. It is my opinion that this investigation was extremely thorough and comprehensive since it covered all Negro employees employed by Gulf on July 2, 1965, whose seniority date antecedes January 1, 1957 (the defined affected class of Negro employees in the Conciliation Agreement). In order to identify this "affected class" the EEOC conducted a thorough search in order to identify all individuals potentially entitled to back pay under the Conciliation Agreement. The personnel records of all affected employees retained by Gulf since the effective date of Title VII of the Civil Rights Act of 1964 were exhaustively analyzed by the EEOC and no persons potentially entitled to a back pay award could be found other than those listed on Attachments "A" and "B" attached to the Conciliation Agreement. In addition to the award of back pay, the Conciliation Agreement provided for an affirmative action program where specific goals and timetables were set mandating that Gulf recruit hire, and promote minorities. In order to ensure that Gulf complies with the terms of the Conciliation Agreement, including awarding back pay to the affected class and complying with the affirmative action goals and timetables, Gulf must report to the EEOC every six months for a period of five years its progress in conforming to the provisions of the Conciliation Agreement. I have read

the prayer for relief in the Plaintiffs' Complaint and it is my opinion that the relief which the EEOC has obtained by way of the Conciliation Agreement provides the same kind of relief which the Plaintiffs seek in their suit.

6. Under the Conciliation Agreement, Gulf was required to notify in writing each member of the affected class that he or she was entitled to an award of back pay and of the conditions of waiver or release required in accepting such an award. The Agreement provided that each member of the affected class shall be furnished a form on which to notify Gulf, within 30 days, whether such member desires to accept or decline the back pay consideration. A failure on the part of any member to respond within the 30 days would be interpreted as an acceptance of back pay under terms of the Agreement. The EEOC approved the form of letter and release which was sent to each member of the affected class. The Conciliation Agreement provides that upon fulfillment of the obligation thereunder, Gulf would be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur Refinery.

7. Gulf commenced mailings under terms of the Agreement approximately three weeks prior to the filing of the suit. Up until the time that Gulf was served with a summons in the suit, it had complied faithfully and fully with all terms of the Conciliation Agreement and approximately 431 Negro employees out of a total of 616 Negro employees entitled to a back pay award had signed releases and received their back pay award. However, Gulf notified the EEOC on the date it was served with a summons in the suit that they could no longer continue to fulfill certain provisions of the Conciliation Agreement

until the Court allowed further contact with potential or actual class members to the suit.

8. So that the employees may receive their back pay awards it is my opinion that Gulf should now be allowed to proceed with completing the back pay awards and receiving releases under the terms of the Conciliation Agreement since that Agreement is a fair, equitable, thorough and comprehensive solution to the charges that Gulf has discriminated at its Port Arthur Refinery in violation of Title VII of the Civil Rights Act of 1964.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before me
this 3rd day of June, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

My Commission Expires June 1, 1977

Exhibit D

AFFIDAVIT OF GERALD C. WILLIAMS

[Caption Omitted in Printing]

STATE OF COLORADO)
)ss
COUNTY OF JEFFERSON)

I, Gerald C. Williams, being duly sworn, depose and say

1. I am an employee of the Office for Equal Opportunity, U. S. Department of the Interior, hereinafter referred to as the OEO, and am located in Lakewood, Colorado, where the OEO maintains its Regional offices. I have worked for the OEO for five years in the position of Western Regional Manager.

2. In my position as Western Regional Manager, I am charged with directing all activties of the OEO for all assigned industries with facilities located in states west of the Mississippi River but including all of the State of Louisiana. Within this geographic area I have the authority, as vested in me by the OEO, to initiate investigations to determine whether or not government contractors or subcontractors are in compliance with Executive Order 11246, as amended, and the implementing regulations of the Department of Labor, 41 CFR 60. In this regard, when there are issues which violate both the Executive Order and Title VII of the Civil Rights Act of 1964, an attempt is made to coordinate with the United States Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, investigations relating to acts of discrimination prohibited by law. I

have the authority to enter into concilation agreements or to approve conciliation agreements which have been entered into with government contractors or subcontractors in cases where reasonable cause exists to believe that their activities are outside of the provisions of Executive Order 11246. In most cases, where the OEO believes that a government contractor or subcontractor is acting outside of the provisions of Executive Order 11246 an employee under my direction and supervision investigates the charge to determine whether or not reasonable cause exists to believe that the Executive Order has been violated. If the investigator finds reasonable cause to believe that the Executive Order has been violated, the OEO attempts to settle all differences by entering into an agreement which in some cases will provide for an award of backpay to the affected employees and an Affirmative Action Program to compel the government contractor or subcontractor to comply with the provisions of the Executive Order.

3. I have read and am familiar with the complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, styled: *Wesley P. Bernard, Et Al v. Gulf Oil Company, Et Al,* Civil Action No. B-76-183-CA, hereinafter referred to as the suit. The complaint was brought by six employees of Gulf Oil Corporation, hereinafter referred to as Gulf, at its Port Arthur Refinery against Gulf Oil Company and the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. In their complaint these individuals have alleged that Gulf and the Union have discriminated against them in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. The issues were the subject of a conciliation

agreement signed April 14, 1976, by representatives of Gulf, the EEOC and the OEO. The charges which have been raised in the suit have been the subject of an OEO investigation which has been conducted over the past several years. Issues which have been raised in the suit have been investigated by the OEO which, among other things, interviewed employees of Gulf at its Port Arthur Refinery, examined all relevant documents and business records of Gulf, conducted on-site investigations at Gulf's Port Arthur Refinery, and held numerous meetings with Gulf's executives. It is my opinion that this investigation was thorough and comprehensive. It covered all Negro employees employed by Gulf on July 2, 1965, whose seniority date antecedes January 1, 1957, the defined affected class of Negro employees in the conciliation agreement.

4. After the major terms of the conciliation agreement had been settled between Gulf and the EEOC, those groups met with representatives of the OEO to discuss further actions required by Gulf in order to be in compliance with Executive Order 11246. As a result of this meeting, a Certificate of Review and Approval was attached to the conciliation agreement as Page 11 and 12 thereto which certified that upon completing certain affirmative action requirements with regard to employment, Gulf would be in full compliance with all of the provisions of Executive Order 11246, as amended, at its Port Arthur Refinery.

5. It is my opinion that the conciliation agreement as entered into between Gulf, the EEOC and the OEO is a fair and reasonable settlement of all charges that Gulf has discriminated against its affected class employees at

its Port Arthur Refinery. In addition, I have no objection to allowing Gulf to pursue fulfillment of the terms of the aforesaid conciliation agreement, including the payment of backpay awards and obtaining the releases of those affected class members who wish to participate in this settlement.

G. C. WILLIAMS

Subscribed and Sworn to before me
this 4th Day of June 1976.

EIDAN A. BROWN
Notary Public in and for
Jefferson County

My Commission expires Aug. 14, 1976

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER

[Caption Omitted in Printing]

Filed June 10, 1976

I.

Preliminary Statement

This action is instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. § 1981. The Complaint, filed on May 18, 1976, alleges a class action on behalf of: (a) all black employees employed by defendant Gulf Oil Company's Refinery of Port Arthur, Texas; (b) all black employees formerly employed by the defendant in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said Company.

II.

Statement of Facts

The issues stated below arise from an order issued by the Honorable William M. Steger on May 28, 1976, limiting communications with any potential or actual class member. This order, attached to this memorandum as Exhibit A, was issued pursuant to a Motion By Gulf To Limit Communications With Any Potential Or Actual Class Member filed on May 27, 1976, and is effective until the Honorable Joe J. Fisher can hear the matter upon formal motion.

As a result of the prohibitions contained in the May 28, 1976 order, plaintiffs' attorneys have been forbidden to communicate, directly or indirectly, with any members of the plaintiffs' class except for the six named plaintiffs to the lawsuit.

One of the attorneys for the plaintiffs is Charles E. Cotton of the New Orleans, Louisiana law firm of Cotton, Jones & Dennis. Another is Stella M. Morrison, a Port Arthur, Texas attorney of the law firm of Morrison, Floyd & Morrison. Associated with them in this instant action are several attorneys employed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., a non-profit corporation engaged in furnishing legal assistance in cases involving claims of racial discrimination. The Legal Defense Fund, which is entirely separate and apart from the National Association for the Advancement of Colored People (N.A.A.C.P.), has been approved by a New York court to function as a legal aid organization. Since 1940, the Legal Defense Fund has furnished legal assistance in civil rights matters in state and federal courts throughout the nation, usually in conjunction with local counsel such as Mr. Cotton and Ms. Morrison in this matter. See *N.A.A.C.P. v. Button,* 371 U.S. 415, 421, n. 5 (1963).[1]

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1. Mr. Barry L. Goldstein, LDF staff attorney, has developed considerable expertise in cases involving employment discrimination. He has been involved in several key precedent setting cases, among which have been *Rodgers v. United States Steel Corporation,* 508 F.2d 152, (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.,* 47 L.Ed.2d 444 (1976); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975); *Ford v. United States Steel Corporation,* 520 F.2d 1043 (5th Cir. 1975). Mr. Ulysses G. Thibodeaux, Earl Warren Fellow with the Legal Defense Fund, has been trained in civil rights litigation by the Legal Defense Fund. His area of concentration has been in fair

In undertaking to represent the named plaintiffs, plaintiffs' attorneys did not accept or expect any compensation from them, nor do they expect to receive any compensation from any additional named plaintiffs who may hereafter be added, or from any member of the plaintiff class. Mr. Cotton and Ms. Morrison expect to be compensated only by such attorneys' fees as may eventually be awarded by the court. The fees collected for work done by the employees of the Legal Defense Fund will be paid over to that non-profit corporation and will not be paid to the individual staff lawyers. Plaintiffs' entitlement to an award of counsel fees by the court would not be affected by the number of individuals named as parties plaintiff since the fees are not paid by the clients but, rather, they are taxed as costs to the defendant. See 42 U.S.C. § 2000e-5(k).

III.

Statement of Issues Presented

1. Whether the district court is possessed of the authority to grant an order restricting communications with any potential or actual class member.

2. Whether an order of a district court restricting communications with any potential or actual class member is unconstitutional in violation of the First Amendment protections of freedom of speech, freedom of association, and privacy of association and the Due Process Clause of the Fifth Amendment.

3. Whether an order of a district court restricting communications with class members is unconstitutional

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employment litigation. Mr. Charles E. Cotton has developed considerable expertise in general civil rights litigation, but more particularly in fair employment litigation. Ms. Stella Morrison, prior to entering private practice, was associated with the Equal Employment Opportunity Commission.

on its face and as applied in that the order overbroadly infringes on constitutionally protected activities.

IV.

ARGUMENT

A district court can adopt rules governing the administration of laws before it. Those rules, however, must be consistent with the letter and spirit of the federal rules of Civil Procedure and with the Acts of Congress. *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975); 28 U.S.C. § 2071. In *Rodgers,* the Court was confronted with a district court order limiting communications with potential members of a class by the plaintiffs or their attorneys pursuant to a local rule of the district court.[2] In granting the plaintiffs a writ of mandamus, the Third Circuit specifically held that the district court was not empowered by Congress under Rule 3 of the Federal Rules of Civil Procedure[3] or 28 U.S.C. § 2071[4] to limit

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2. Local Rule 34(d) of the District Court for the Western District of Pennsylvania stated:

> No communication concerning such action (class action) shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

3. Rule 83, Fed. R. Civ. reads in pertinent part:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

4. 28 U.S.C. § 2071 reads:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business, such rules shall be consistent with acts of congress and rules of practice and procedure prescribed by the Supreme Court.

communications between plaintiffs, or their attorneys, and third parties when such communication sought to encourage common participation in a class action lawsuit. A district court could not issue an order pursuant to a rule such as Local Rule 34(d) prior to class action certification.

The local rule in *Rodgers, supra,* was promulgated pursuant to Rule No. 7 suggested by the *Manual For Complex Litigation,* the very same suggested rule being relief on by the defendant in this instant action. *Rodgers* suggested that the panel which drafted the *Manual* "went too far in its apparent assumption that [a district court had] unreviewable discretion . . . to impose a prior restraint on communication or association," and that "the panel had no power to enlarge the statutory rule making authority of the district courts". 508 F.2d at 165.

Rodgers recognized that important constitutional rights of freedom of speech and association were involved in a rule limiting communications with class members, but declined to decide the constitutional issues. However, in another aspect of this litigation, the District Court for the Western District of Pennsylvania issued protective orders prohibiting disclosure of information contained in a deposition and placing a memorandum under impoundment. The plaintiffs' petition for a writ of mandamus was granted based on a finding that the judge's orders were unconstitutional. Because the orders constituted a prior restraint on petitioners' counsel's freedom of speech in violation of the First Amendment, the district court was not acting within the "proper sphere of its lawful power". *Rodgers v. United States Steel Corporation and Honorable Hubert I. Ieitelbaum,* No. 76-1340 (3rd Cir., June 3, 1976). A copy of that decision is attached as Exhibit B.

Standing alone, the opinions in *Rodgers v. United States Steel Corporation* are sufficiently compelling authorities to permit denied of defendant's motion. The significant constitutional questions involved which result from an order limiting communications with class members, however, merit further discussion. The Supreme Court has specifically addressed the question and ruled that an order limiting communications would infringe upon constitutionally protected collective activity by civil rights advocates. See *NAACP v. Button,* 371 U.S. 415 (1963). An order prohibiting communications and associations with members of a group seeking legal redress for civil rights violations is constitutionally impermissible:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences, it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . .
>
> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, *association for litigation may be the most effective form of political association.* 371 U.S. at 429, 431 (emphasis added).

Following *NAACP v. Button* several cases concerning injunctive restraints on "solicitation" which were far more narrow than the order sought by the defendant in this case held such restraints unconstitutional. See, *Brother-*

hood of Railroad Trainmen v. Virginia ex rel State Bar, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971). "The common thread running through our decision in *NAACP v. Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a federal right within the protection of the First Amendment." *United Transportation Union, supra,* 401 U.S. at 585.

The defendant's memorandum states on page 3 that communications between plaintiffs' counsels and actual and potential class members "could seriously prejudice Gulf in its defense of this case and the conciliation efforts which have been conducted by the Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior." This reason is insufficient to justify the imposition of limits on communications. Past judicial attempts to curb even mass-media dissemination of "out-of-court publications pertaining to a pending case," *Bridges v. California,* 314 U.S. 252, 268 (1941), have been held unconstitutional. To justify criminal punishment (let alone prior restraint) there must be an imminent peril to the administration of justice. *Craig v. Harney,* 331 U.S. 367 (1947). In the present situation, there is no pending litigation, but only a non-judicial conciliation agreement of attempts to curb out of court statements concerning pending litigation are unconstitutional, then surely an order limiting communications with class members with respect to a settlement agreement is likewise unconstitutional. Moreover, the conciliation agreement to which the defendant refers grows out of Commission Charge No. AU68-9-154E. This

present lawsuit is concerned with charges filed by employees of the defendant before the EEOC in June, 1967. These charges were not the basis of the present "settlement" entered into between Gulf Oil Company, the EEOC and the U. S. Department of the Interior. Gulf's assertion on page 1 of its memorandum that "[t]he issues which have been raised in this lawsuit have been the subject of settlement negotiations between Gulf, the U. S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of Interior" is erroneous. The plain truth is that Gulf Oil Co. did not wish to entertain conciliation discussions to resolve the complaints of employees which forms the springboard for this present action. A copy of a letter to that effect from the EEOC to Mr. Wesley P. Bernard, one of the named plaintiffs, is attached as Exhibit C.

Most importantly private individuals have a right to a *full* remedy from the affects of racial discrimination in employment. *Franks v. Bowman Transportation Co.*, 47 L.E.D. 2d 444 (1976); *Albermarle Paper Company v. Moody*, 422 U.S. 405 (1975). Individuals have a right to pursue their remedy even after there has been a "pattern and practice" suit litigated on their behalf by the federal government. *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, *1201 cert. denied*, 411 U.S. 931 (1973); *Rodriques v. East Texas Motor Freight*, 505 F.2d 40, 65 (5th Cir. 1974) *cert. granted* on other issues. NO. 75-718 (May 25, 1976) *A fortiori*, a private suit which is designed to seek a complete remedy to employment discrimination is appropriate after a conciliation agreement which has not been approved by a federal court and for which there has been no finding that it fully or even substantially remedies the practices of discrimination at Gulf.

The order sought by Gulf Oil comes to court with a "heavy presumption against its constitutional validity," thus placing "a heavy burden [on Gulf] of showing a justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

Apparently, the defendant is concerned that communications may prejudice its defense of this case and its conciliation efforts. The order it seeks is replete with adminitions against solicitation. Suffice it to say that a government "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button, supra,* 371 U.S. at 439. Imposition of a prior restraint of speech and association under the guise of preventing solicitation is beyond the power of the Court under the First Amendment. Additionally, the concern for solicitation is mitigated by the American Bar Association's belief that the ordinary rules against solicitation are to be relaxed when litigation is "wholesome and beneficial". ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 148, at 311 (1935) The policy underlying Title VII litigation has been favorably viewed. See, *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody, supra.* In fact, to encourage Title VII litigation, Congress saw fit to include a provision for attorneys' fees. See 42 U.S.C. § 2000e-5(b); *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974). An order limiting communications then, would serve to subvert the judicially-recognized public policy favoring vigorous prosecuting of employment discrimination actions.

The order sought by defendant Gulf Oil Company and granted by the Honorable William Steger on May 28,

1976 is, by its own wording not limited to communications directed at solicitation. It bans *all* communications, however innocuous or lawful those communications might be. Consequently, it suffers the fatal defect of overbreadth. *NAACP v. Button, supra,* cautioned that "[B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. 371 U.S. at 433. The order which Gulf Oil now seeks to extend simply does not meet *Button's* test of "narrow specificity".

If the defendant's motion for an order limiting communications with any actual or potential class member is granted, a discriminatory regulation of free speech and free association would result. It would unfairly disadvantage those black employees who wish to be informed about various labor practices or about ways in which to seek additional relief not agreed to in the recently consummated conciliation agreement. Every black employee has the right to seek legal assistance, to refuse to sign a waiver of his rights, and to ask the court in a proper proceeding to grant more relief from a pattern of systemic discrimination, every black worker has the right to choose to hear comments about the problem of racial discrimination in employment by attorneys knowledgeable in that particular field. Every black worker at Gulf Oil Co. has the right to communicate with attorneys who purport to represent them in a class action involving their very livelihood, e.g., their jobs, their salaries, their promotions, their back pay, etc. All of these rights are violated by an order restricting communications.

The above infringements are all the more evident when viewed in light of the freedom of communication enjoyed by the defendants. Defense Counsel are free to consult with

their client(s) with respect to any matter relevant to this lawsuit. Their clients are able to freely communicate with black employees in the course of regular work activity and thus are able to explain their interpretation of the conciliation agreement at will. The order sought by defendant is so one-sided as to constitute a denial of due process of law. Such a violation occurs by a federally imposed discrimination which, if imposed by a state, would violate the Equal Protection Clause. *Bolling v. Sharpe,* 347 U.S. 497 (1954). This one-sidedness is clearly disadvantageous to black workers who have a right to know about employment practices and conciliation agreements from sources other than the defendant who is alleged to have commited violations of the equal employment laws.

Imposition of an order limiting communications would have a detrimentally inhibitory effect on an actual or potential class members' right to counsel. Meaningful cooperation and exchanges would be stifled because of a class members' reluctance to approach counsel on matters pertaining to the pending litigation. Suppression of all or any communications between counsel and client, or between counsel and potential client is tantamount to a denial of freedom of association. Little imagination is needed to discern that such a drastic action would be contrary to the principle that "[i]nviolability of privacy in group associations, may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs". *NAACP v. Alabama ex rel John Patterson,* 357 U.S. 449, 462 (1958). Indeed, the right to associate with one's own counsel has been called "unqualified." *Chandler v. Fretag,* 348 U.S. 3, 9 (1954). Certainly, this is especially true in

a complex fair employment action where "laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counselled adversaries. . . ." *Brotherhood of R. Trainmen v. Virginia, supra,* 377 U.S. at 7.

Finally a limit on communications would impose unconscionable barriers on the ability of plaintiffs' counsel to practice law and present a case worthy of the trust placed in them by the plaintiffs. Plaintiffs' counsel would be deprived of the opportunity to interview large groups of employees for helpful factual data and would additionally be deprived of the opportunities to conduct general inquiries. In sum, an order limiting communication would severely impede the ability of counsel to effectively present the claims of class members, to discover and assess the strengths and weaknesses of the case, and to define the scope of the issues with greater specificity. By so doing, the progress of the case will be substantially curtailed, a result entirely inconsistent with the directive of Section 706(f)(5) of Title VII:

> It shall be the duty of the judge designated . . . to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

CONCLUSION

For the reasons stated, the Defendant's Motion To Limit Communications With Any Actual Or Potetial Class Member should be denied.

[Signatures Omitted in Printing]

[Certificate of Service omitted in printing]

FIRST SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GULF'S MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

Filed June 16, 1976

This First Supplemental Memorandum is submitted pursuant to an order by the Court on June 11, 1976, that the parties to this action will have until Tuesday, June 15, 1976, to submit final memoranda concerning Gulf's Motion to Modify Judge Steger's order dated May 28, 1976.

During the hearing before the Court on June 11, 1976, counsel for the Plaintiffs informed the Court that he opposed a continuation of Judge Steger's Order entered May 28, 1976, and he opposed Gulf's Motion to Modify Judge Steger's Order which would allow Gulf to comply with the terms of the Conciliation Agreement entered into between Gulf, the Equal Employment Opportunity Commission (EEOC) and the Office for Equal Opportunity, U.S. Department of the Interior (OEO). In support of his position, counsel for Plaintiffs relied upon the case of *Rogers v. U.S. Steel Corporation,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975). It is Gulf's position that the decision in the *Rogers* case is totally inapplicable to the facts and circumstances in this case for many reasons.

The most important reason why the *Rogers* decision is inapplicable to this case is that the Local Rule 34(d) considered by the court in that case is entirely different from the order which Gulf seeks to have entered in this

case. As the court stated in the *Rogers* case, Local Rule 34(d) of the District Court for the Western District of Pennsylvania did not incorporate the exceptions which were suggested by the *Manual for Complex Litigation.* In addition, Local Rule 34(d) was adopted from an earlier edition of the *Manual* which did not include the protected exemptions which are now included in the revised *Manual.* See *Manual for Complex Litigation,* section 1.41, p. 106 CCH Edition 1973, a copy of which is attached hereto as Exhibit A. Thus, the *Rogers* court did not consider the current suggested order concerning limitation of communications with potential class members as contained in the *Manual for Complex Litigation.* The current order suggested by the *Manual* avoids the constitutional issues raised by the plaintiffs in this case since it specifically exempts constitutionally protected communication when the substance of such communication is filed with the court.

A second reason why the *Rogers* decision is inapplicable to the present case is that we are concerned here with an order of the Court and not a Local Rule as was the court in the *Rogers* case. The court stated in *Rogers*:

> "The limited issue before us, however, is whether the District Court can prior to making a class action termination, insist on compliance with *Local Rule 34(d)* as a condition to the further consideration of a Rule 23(d)(1) motion. We hold that it may not." *Rogers supra* at 164. (Emphasis added.)

The present case does not present an issue such as the above since not only is there no Local Rule involved here, but such a Local Rule is not made a condition to the further consideration of a Rule 23(d)(1) motion.

More importantly, the Order entered by Judge Steger in the present case was made necessary due to the actions of Plaintiffs' counsel. Thus, in this case activities of counsel for the Plaintiffs have indicated that the order suggested by the *Manual for Complex Litigation* should be entered limiting communications with potential class members.

During the conference with the Court on June 11, 1976, Gulf suggested that the Court modify Judge Steger's Order to include the exemptions stated in Pretrial Order No. 15 in the *Manual for Complex Litigation.* Judge Steger's Order did not include the exemptions since he wanted to maintain the status quo of the case until this Court returned and assumed control of the case. In essence, Judge Steger wanted to limit all communications with potential class members during the Court's absence. It was recognized in the concurring opinion to *Rogers* that the current rule in the *Manual* is properly drawn: "The suggested rule found in the appendix to the *Manual for Complex Litigation,* Part 1, Section 1.41, . . . is more narrowly drawn and, as the majority points out, specifically exempts communications protected by a constitutional right." *Rogers supra* at 166.

In order that the exemptions as provided for in the *Manual for Complex Litigation* can be incorporated into Judge Steger's Order, Gulf has attached hereto as Exhibit B a suggested order which would modify Judge Steger's Order to include the exemptions. In addition to including the exemptions, Exhibit B modifies Judge Steger's Order to allow Gulf to comply, under the Court's supervision, with the requirements of the Conciliation Agreement as outlined in Gulf's pending Motion to Modify.

Finally, Gulf would like to point out to the Court the strong mandate of the Fifth Circuit Court of Appeals as stated in *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975) that private settlements of charges that the employer has violated Title VII should be encouraged. Judge Thornberry in speaking for the court stated:

> "As early as 1968, Judge Bell wrote for this Court: 'It is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.' *Latis v. Crown Zellerbach Corp.*, (5th Cir. 1968), 398 F.2d 496, 498 (emphasis added). Subsequently, in *Dent v. St. Louis-San Francisco Ry. Co.*, (5th Cir. 1969), 406 F.2d 399, 402, Judge Coleman advanced the same thesis:
>
> > Thus it is quite apparent that the basic philosophy of these statutory provisions is that *voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action.* (emphasis added.)
>
> In *Culpepper v. Reynolds Metals Co.*, (5th Cir. 1970), 421 F.2d 888, 891, we declared that 'the central theme of Title VII is 'private settlement' as an effective end to employment discrimination,' citing *Oatis*. Next, in *Hutchings v. United States Industries, Inc.*, (5th Cir. 1970), 428 F.2d 303, 309, Judge Ainsworth stated:
>
> > [I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation (citing *Oatis*) on the ground that voluntary compliance is preferable to court action. (citing *Dent*). *Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment prac-*

tices by informal means leading to voluntary compliance. (emphasis added.)

Our recent excursions into this area have not detoured from the foregoing principles, but have emphasized instead their practical value." *United States v. Allegheny-Ludlum Industries, Inc. supra* at 846 and 847.

Conclusion

In view of the above stated authorities, Gulf's Motion to Modify should be granted.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

EXHIBIT A

Appendix of Materials

* * *

§ 1.41 Sample Pretrial Order No. 15—Prevention of Potential Abuses of Class Actions

(To be promptly entered in actual and potential class action orders unless there is a parallel local rule)

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subpargraph (b)(3) of Rule 23, F.R. Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tend-

ing, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

A hearing at which applications may be presented for relaxation of this order and proposed communications with actual or potential members of the class is hereby set for _____ at _____ __m.

Dated this _____ day of _____, 19_____

_____

JUDGE

* * *

EXHIBIT B

ORDER

[Caption Omitted in Printing]

The within and foregoing motion of Gulf Oil Corporation to modify Judge Steger's Order dated May 28, 1976, having been considered;

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

> In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay

fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication,

if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior;

(4) That the Clerk of Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's Order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from

the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

_____

United States District Judge

June ____, 1976.

Appendix I

Pursuant to the Court's order, I have been asked to notify you that there is pending in the United States District Court for the Eastern District of Texas a lawsuit styled *Bernard, et al v. Gulf Oil Company and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23*, being Civil Action No. B-76-183-CA. This is a suit by six individual employees at Gulf's Port Arthur Refinery who have brought this suit on their behalf and on behalf of all other individuals who are similarly situated, and alleging that Gulf and the Union have discriminated against them and the class they represent in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. This notice is being sent to you because you have been identified as an actual or potential class member who at some later date may be entitled to become a member of the class which the named Plaintiffs seek to represent.

You have received a notice from Gulf dated May 1, 1976, that you are entitled to an award of back pay under a Conciliation Agreement which has been negotiated on your behalf by the United States Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of Interior. The Court has asked me to inform you that at this time you have a choice of whether to accept the offer from Gulf dated May 1, 1976, and receive the back pay award as stated in that letter or you may decline to accept that offer at this time and at some later date be considered for inclusion in the class of individuals which the Plaintiffs seek to represent in the above mentioned lawsuit. If you

decide to accept Gulf's offer, you should execute the receipt and release enclosed in Gulf's letter to you dated May 1, 1976, and return it to Gulf within 45 days from the date of this letter. If this is done, you will receive your back pay award shortly thereafter.

If you do not execute the receipt and release and deliver it to Gulf within 45 days from the date of this letter, it will be presumed that you do not wish to accept the offer contained in Gulf's letter of May 1, 1976. Any award you might receive as a result of the above mentioned lawsuit will depend upon whether you are included in any class so certified by the Court and whether the class is declared entitled to an award of back pay by the Court.

Clerk, U.S. District Court,
Eastern District of Texas

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

I

PRELIMINARY STATEMENT

This action is instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. § 1981. The Complaint, filed on May 18, 1976, alleges a class action on behalf of: (a) all black employees employed by defendant Gulf Oil Company's Refinery of Port Arthur, Texas, (b) all black employees formerly employed by the defendant in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said Company.

II

STATEMENT OF FACTS

On May 28, 1976, the Honorable William M. Steger entered an order limiting communications with any potential or actual class member. The order was to be effective until the Honorable Joe J. Fisher could hear the matter upon formal motion. On June 8, 1976, Gulf Oil filed a Motion To Modify Judge Steger's Order dated May 28, 1976. The motion seeks to bar all further communications with actual or potential class members as well as to allow Gulf, the EEOC, and the Department of Interior to proceed under the terms of a Conciliation Agreement dated April 14, 1976. This Agreement grows out of a Commission Charge of the EEOC and is not the result of efforts

to conciliate charges brought before the EEOC against Gulf Oil by individual class complainants. Further, the Conciliation Agreement is not an attempted settlement of a civil action brought in a federal court.

A hearing on the Motion To Limit Communications was held before the Honorble Joe J. Fisher on June 11, 1976. Judge Fisher deferred ruling on the motion pending the submission of memoranda on the Motion to Modify.

III

ARGUMENT

Gulf Oil's Motion To Modify Order is predicated on the order entered by the Honorable William M. Steger on May 28, 1976. The legal propriety of that order was addressed in plaintiffs' Memorandum of Law In Opposition To Defendant Gulf Oil Company's Motion to Limit Communications with Any Actual or Potential Class Member, submitted to this Court on June 10, 1976. The arguments advanced in that memo are hereby incorporated by reference into this present memo. To summarize, plaintiffs aver that (1) the order is not within the power of a district court to grant. See *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975); *Rodgers v. United States Steel Corporation and Honorable Hubert I. Teitelbaum,* No. 76-1340 (3rd Cir., June 1976); (2) the order infringes upon constitutionally protected First Amendment freedom of speech, freedom of association, and privacy of association. See *NAACP v. Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia ex rel State Bar,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,*

401 U.S. 576 (1971); (3) the order violates the Due Process Clause of the Fifth Amendment in that it unfairly discriminates in favor of the defendants. See *Bolling v. Sharpe,* 347 U.S. 497 (1954); and, (4) the order is unconstitutional on its face because of the fatal defect of overbreadth. See *NAACP v. Button, supra.* A finding, therefore, of constitutional infirmity with respect to the Motion To Limit Communications destroys the merits of defendant's Motion To Modify the order since the latter is based upon the validity of the former.

Gulf Oil Company relies on two cases, *Weight Watchers of Philadelphia, Inc., v. Weight Watchers International, Inc.,* 455 F.2d 770 (2nd Cir. 1972), and *American Finance System, Inc., v. Harlow,* 65 F.R.D. 572 (D. Md. 1974) to support its Motion To Modify. These cases, however, concerned themselves with defendants' attempts to negotiate settlements of purported class action suits with individual members of the asserted class *after* a lawsuit had been filed. In the instant case, Gulf is attempting not only to restrain communications with actual or potential class members, but also is seeking to continue offering backpay settlements to affected class members in a Conciliation Agreement which was not the subject of a court action.[1] The plaintiffs are simply attempting to

1. The plaintiffs are not trying to stop the Company from tendering offers under the Conciliation Agreement. These tenders are made pursuant to a private agreement, not judicially approved, between two agencies of the Government and the Company. Neither the Union defendant nor the plaintiffs' class were parties to this agreement. The legality of the waivers remains to be determined. *United States v. Allegheny Ludlum Industries,* 517 F.2d 826 (5th Cir. 1975) *cert. denied* U.S.L.W. (1976). However, the plaintiffs and the class they represent have an unfettered right to consult with attorneys experienced in civil rights and fair employment litigation concerning their alternatives. See Exhibit A-C.

communicate to other asserted class members the issues involved in the present lawsuit and also the problems and alternatives to the Conciliation Agreement entered into between Gulf Oil, the EEOC and the Department of the Interior. (*See* Affidavits attached hereto as Exhibits A-C). To disallow this right to the plaintiffs would be to ignore the teachings of *Rodgers v. U. S. Steel,* supra, and *NAACP v. Button, supra.*

Regardless of how the defendants proceed, the right to challenge the validity and fairness of the proposed non-judicial "settlement" is not pre-empted by the defendants' actions or the purported class members' responses. See, e.g. *Williamson v. Bethlehem Steel Corp.,* 468 F.2d 1201 (2nd Cir. 1972), *cert. denied,* 411 U.S. 931 (1973); *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40, 65 (5th Cir. 1974), *cert. granted on other issues,* 44 U.S.L.W. 3661 (May 25, 1976); *United States v. Allegheny-Ludlum Industries, Inc.,* 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3593 (Apr. 20, 1976).

In its memorandum to the Court, Gulf Oil Co. relies heavily on the affidavits of EEOC and Interior Officials in support of the Conciliation Agreement. Initially, it must be emphasized that the adequacy of the conciliation agreement is not at issue at this time. Moreover, without any presentation of evidence it is, of course, impossible for this Court to evaluate the adequacy of the Conciliation Agreement. But, the agreement on its face does not appear to satisfy the dictates of Title VII. For instance, the Conciliation Agreement does not provide for well-established types of relief such as advance-level entry and job by-pass; there is a one-shot opportunity to bid and

transfer into a different job classification; there are no provisions for a firm recruitment program; there is no firm commitment on goals and timetables; the affirmative action program is merely a statement of policy rather than a realistic, programmatic approach to the underutilization of minorities in the defendant's work-force. The goals provided, one black, mexican-american, or woman for each four whites selected for jobs from which blacks are underutilized (the goal is one to six for supervisory positions) is inadequate to remedy the practices of discrimination in an area where over 50% of the population is black; there is no relief from unlawful employment testing programs. These are only some of the examples of how the Agreement does not begin to approach the relief requested by the plaintiffs. In fact, the settlement agreement simply does not satisfy the purpose underlying fair employment litigation which is to "make whole" those persons injured by discriminatory employment practices. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

Additionally, the notices that were sent out to backpay eligibles under the Conciliation Agreement did not explain the types and extent of relief in the agreement, and did not explain the method by which backpay was computed. Further, the affected employees were not told that acceptance of the agreement would be assumed if after the passage of thirty days, the employees had not responded to Gulf's notice. All of the above reasons make communications between the class attorneys with potential and/or actual class members essential. It cannot be assumed that because the government agencies, EEOC and Department of Interior, have approved the settlement of a Commissioner's Charge that the practices of discrimi-

nation have been remedied; as the Fifth Circuit stated in *Rodriquez*:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. 505 F.2d at 66.

Gulf's concern that there be a limit on communications so that ". . . individuals . . . might make their own independent decision concerning the acceptance of the back-pay award", (p.4 of defendant's memorandum to the Court) is not in accord with the principle that " . . . the Constitution protects expression and association without regard to the . . . truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button, supra,* at 444-445. Plaintiffs submit that the defendant, Gulf Oil, has not more business telling them how to deal with their associates that the plaintiffs have in instructing Gulf how to deal with its associates and advisors. Moreover, the class members have a right to be informed by counsel as to their rights under the civil rights laws.

CONCLUSION

For the reasons stated, the Defendant's Motion To Modify The Order should be denied.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

EXHIBIT "A"

AFFIDAVIT

[Caption Omitted in Printing]

STATE OF NEW YORK

COUNTY OF NEW YORK

BARRY L. GOLDSTEIN, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein. I am employed as a staff attorney with the NAACP Legal Defense and Educational Fund, Inc., in New York City. I have worked there as an attorney since August, 1971. During the years of my employment I have been continuously and almost exclusively involved in the litigation in federal courts in various states of employment discrimination cases.

2. The Legal Defense and Educational Fund, Inc., is a non-profit corporation engaged in furnishing legal assistance in cases involving claims of racial discrimination. I am an attorney admitted to the practice of law before the Appellate Division of the State of New York, the United States District Court for the Southern and Eastern Districts of New York, the United States Court of Appeals for the Second, Fourth, Fifth and Sixth Circuits and Supreme Court of the United States.

3. The Legal Defense Fund has been approved by the Appellate Division of the State of New York to function as a legal aid organization. It is entirely separate and apart from the National Association for the Advancement of Colored People (N.A.A.C.P.).

4. Since 1940, the Legal Defense Fund has furnished legal assistance in civil rights matters in state and federal courts throughout the nation, usually in conjunction with local counsel. See *N.A.A.C.P. v. Button,* 371 U.S. 415, 421, n.5 (1963). The United States Supreme Court has cited the organization as one "which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button, id.* at 422. As pointed out by Chief Judge Brown attorneys employed at the Legal Defense Fund have represented individuals in hundreds of civil rights cases in the Fifth Circuit and in the district courts of that circuit, *Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 539, n.14 (5th Cir. 1970).

5. Specifically attorneys at the Legal Defense Fund have represented the plaintiffs in many landmark cases brought pursuant to Title VII which have been decided in the Supreme Court,[1] the Fifth Circuit,[2] and in other Circuits.[3]

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1. See e.g., *Griggs v. Duke Power Company,* 401 U.S. 424 (1971); *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542 (1971); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Johnson v. Railroad Express Agency,* 421 U.S. 454 (1975); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.,* 47 L.Ed.2d 444 (1976); *Brown v. General Service Administration,* 44 U.S.L.W. 4704 (1976).

2. *King v. Georgia Power Co.,* 474 F.2d 906 (1973); *Johnson v. Georgia Highway Express,* 488 F.2d 714 (1974); see e.g., *Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (1974); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (1974); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (1975); *Ford v. United States Steel Corporation,* 520 F.2d 1043 (1975); *Watkins v. Scott Paper Co.,* ____F.2d____ (5th Cir. 1976), 11 EPD ¶ 10,880.

3. *Chance v. Bd. of Examiners,* 458 F.2d 1167 (2nd Cir. 1972); *Patterson v. N.M.D.U.,* 514 F.2d 767 (2nd Cir. 1975); *Rodgers v. U.S. Steel Corp.,* 508 F.2d 152 (3rd Cir. 1975); *Robinson v.*

6. In undertaking to represent the named plaintiffs in this action, neither I nor any other attorney at the Legal Defense Fund has accepted or expects to receive any compensation from them, nor do we expect to receive any compensation from any additional named plaintiffs who may hereafter be added, or from any member of the plaintiff's class.

7. The fees collected for work done by me or any employee of the Legal Defense Fund in regard to this litigation will result from court-awarded attorneys' fees which are taxed as costs to a defendant(s). See 42 U.S.C. §2000e-5(k). These fees will be paid over to the Legal Defense Fund and will not be paid directly to me or to any other staff attorney.

8. At this stage in the proceedings, plaintiffs' counsel find it necessary to communicate with members of the proposed class of black employees alleged to have been subjected to racial discrimination by Gulf Oil Company and the Oil, Chemical, and Atomic Workers International Local Union 4-23. Otherwise, plaintiffs and their attorneys will be restrained from effectively representing the claims of class members, completing discovery, and defining the scope of the issues with specificity. Only by communicating with members of the proposed class with individual complaints of racial discrimination can plaintiffs' counsel investigate systematic and individual racial

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Lorillard Co., 444 F.2d 791 (4th Cir. 1971); *Patterson v. American Tobacco Co.*, ____F.2d____, 11 EPD ¶ 10,728 (4th Cir. 1976); *Newman v. Avco*, 451 F.2d 743 (6th Cir. 1971); *Rice v. Gates Rubber Co.*, 521 F.2d 782 (6th Cir. 1975); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974) *cert. denied* 44 U.S.L.W. 3670 (May 25, 1976); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975) vac. and rem. 44 U.S.L.W. 3199 (Oct. 7, 1975).

discrimination in employment at Gulf Oil Company and supplement documents and records to be obtained from defendant company.

9. Also it is essential that plaintiffs' attorneys be able to communicate with class members in order to inform them of their rights under the fair employment laws and to answer any questions or concerns which they may have. This is of crucial importance at this time because of the offers being tendered to class members under the Conciliation Agreement entered into between the EEOC and Gulf Oil Company.

BARRY L. GOLDSTEIN

Sworn to and subscribed before me
this 16th day of June, 1976

GERTRUDE A. REYNOLDS
Notary Public

EXHIBIT B

AFFIDAVIT OF ULYSSES GENE THIBODEAUX

[Caption Omitted in Printing]

STATE OF NEW YORK

COUNTY OF NEW YORK

ULYSSES GENE THIBODEAUX, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein. I am licensed to practice law in the State of Louisiana and am presently serving as an Earl Warren Fellow with the NAACP Legal Defense and Educational Fund, Inc. in New York City.

2. The Earl Warren Fellowship Program is part of the legal training program of the Legal Defense Fund. It functions as a vehicle to prepare young attorneys in substantive civil rights litigation and federal procedure. As an Earl Warren Fellow, I have been involved in various areas of civil rights law. My primary area of concentration, however, has been in fair employment litigation.

3. This action was commenced by the filing of a complaint on May 18, 1976.

4. On May 22, 1976, the named plaintiffs in this action held a meeting in Port Arthur, Texas. In attendance were black workers who are employed or were employed by Gulf Oil Company in Port Arthur, Texas and who are members of the class alleged in this action.

5. The meeting on May 22, 1976 was requested by the named plaintiffs in this action.

6. Attorneys representing the named plaintiffs were invited to attend the meeting to discuss the issues involved in the lawsuit, the types of relief requested, and to generally explain some of the administrative and legal problems inherent in fair employment litigation. I, along with Charles E. Cotton of New Orleans, Louisiana and Stella M. Morrison of Port Arthur, Texas accepted the invitations to speak to the group and to answer questions concerning the pending lawsuit and the Conciliation Agreement entered into between Gulf, the EEOC, and the United States Department of the Interior on April 14, 1976.

7. Contrary to the Company's assertion in its memoranda filed on May 27 and June 8, 1976, I did not at any time during the course of the meeting advise actual or potential class members not to accept the defendant's offer of settlement, nor did I state to the assembled group that counsel for the plaintiffs could obtain twice the amount of backpay for the class as has been offered to them under the Conciliation Agreement of April 14, 1976.

8. The ability of plaintiffs and their counsel to present effectively the claims of class members, to discover the case, and to define the scope of the issues with greater specificity depends in significant part on their having access to class members, to investigate their complaints, to prepare witnesses, and to supplement the available defendants' documentary materials by interviewing their

employees. At this stage, such communication becomes appropriate and necessary.

ULYSSES GENE THIBODEAUX

Dated:

Sworn to and subscribed before
me this 16th day of June, 1976.

GERTRUDE A. REYNOLDS
Notary Public

EXHIBIT C

AFFIDAVIT OF STELLA M. MORRISON

[Caption Omitted in Printing]

STATE OF TEXAS

COUNTY OF JEFFERSON

STELLA M. MORRISON, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein: I am associated with the Port Arthur, Texas firm of Morrison, Floyd and Morrison and I am licensed to practice law in the State of Texas.

2. I accepted an invitation to attend a meeting of named plaintiffs and interested parties held in Port Arthur, Texas on May 22, 1976.

3. During the meeting on May 22, 1976, I answered questions directed to me by several of the interested parties with respect to the issues and problems contemplated in this lawsuit.

4. During the course of the May 22, 1976 meeting, Mr. Ulysses Gene Thibodeaux, one of the attorneys for the plaintiffs, contrary to the assertions made by the defendant Company, did not recommend the refusal of the offer of settlement by Gulf Oil Company pursuant to the Conciliation Agreement of April 14, 1976, nor did Mr. Thibodeaux represent that attorneys for the plaintiffs could secure twice the monetary settlement of the Conciliation Agreement in a civil action in federal court.

5. In undertaking to represent the named plaintiffs, neither I nor any of the attorneys representing the plaintiffs accepted or expect any compensation from them, nor do we expect to receive any compensation from any additional named plaintiffs who may hereafter be added, or from any member of the plaintiff class. We expect to be compensated only by such attorney's fees as may eventually be awarded by the court. My entitlement to an award of counsel fees by the court would not be affected by the number of individuals named as parties plaintiff since the fees are not paid by the clients but, rather, they are taxed as costs to the defendant(s). See 42 U.S.C. §2000e-5(k).

6. The ability of plaintiffs and their counsel to present effectively the claims of class members, to discover the case, and to define the scope of the issues with greater specificity depends in significant part on their having access to class members, to investigate their complaints, to prepare witnesses, and to supplement the available defendants' documentary materials by interviewing their employees. At this stage, such communication becomes appropriate and necessary.

7. As of this date thirty-four individual members of the class have signed retainer agreements which retain myself and my co-counsel as their attorneys to represent them in litigation designed to fully protect their rights under the fair employment laws and to seek a full remedy for

any injury they my have suffered as a result of the unlawful employment practices of the defendants.

STELLA M. MORRISON
Stella M. Morrison

Dated:

Sworn to and subscribed before
me this 17th day of June, 1976

GWENDOLYN BLAKE
Notary Public in and for
Jefferson County, Texas

MOTION BY DEFENDANT GULF OIL CORPORATION TO DISMISS COMPLAINT

[Caption Omitted in Printing]

Comes now Gulf Oil Corporation, a Defendant in the above styled cause, and moves the Court for an order to dismiss the Complaint herein pursuant to Rule 12(b) (1) and (6) of the Federal Rules of Civil Procedure and for an order granting such other, further and different relief as the Court may deem just and proper.

This motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state claims upon which relief may be granted is made on the following grounds:

(1) The jurisdictional prerequisites for maintaining this action contained in Title VII of the Civil Rights Act of 1964, as amended, have not been met;

(2) This action is barred by the applicable statute of limitations;

(3) This action is barred by laches;

(4) The Complaint fails to set forth the elements of Plaintiffs' purported claims sufficiently to show that Plaintiffs are entitled to relief;

(5) The Complaint fails to plead with particularity the circumstances showing that the Plaintiffs have met the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42. U.S.C. §2000e, *et seq.;* and

(6) The Complaint fails to state a claim upon which relief can be granted.

In connection with this motion, the undersigned Defendant relies upon the Complaint filed herein, as well as upon the supporting memorandum to be filed.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

ORDER

[Caption Omitted in Printing]

The within and foregoing Motion of Gulf Oil Corporation to Dismiss having been considered:

IT IS ORDERED that the Complaint in this action be dismissed, with prejudice, and that the Plaintiffs bear all costs of this action.

_____

United States District Judge

ORDER

[Caption Omitted in Printing]

Filed June 22, 1976

The within and foregoing motion of Gulf Oil Corporation to modify Judge Steger's Order dated May 28, 1976, having been considered;

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal

parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Con-

ciliation Agreement dated April 14, 1976, between Gulf, the U. S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F2d 826 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3589 (U. S. April 20, 1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above:

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir. 1975), *cert. denied,* 420 U.S. 969 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation,* Section 1.41 p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

ENTERED this the 22nd day of June, 1976.

JOE J. FISHER
United States District Judge

APPENDIX I

Pursuant to the Court's order, I have been asked to notify you that there is pending in the United States District Court for the Eastern District of Texas a lawsuit styled *Bernard, et al v. Gulf Oil Company and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23,* being Civil Action No. B-76-183-CA. This is a suit by six individual employees at Gulf's Port Arthur Refinery who have brought this suit on their behalf and on behalf of all other individuals who are similarly situated, and alleging that Gulf and the Union have discriminated against them and the class they represent in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. This notice is being sent to you because you have been identified as an actual or potential class member who at some later date may be entitled to become a member of the class which the named Plaintiffs seek to represent.

You have received a notice from Gulf dated May 1, 1976, that you are entitled to an award of back pay under a Conciliation Agreement which has been negotiated on your behalf by the United States Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of Interior. The Court has asked me to inform you that at this time you have a choice of whether to accept the offer from Gulf dated May 1, 1976, and receive the back pay award as stated in that letter or you may decline to accept that offer at this time and at some later date be considered for inclusion in the class of individuals which the Plaintiffs seek to represent in the above mentioned lawsuit. If you decide to accept Gulf's offer, you should execute the re-

ceipt and release enclosed in Gulf's letter to you dated May 1, 1976, and return it to Gulf within 45 days from the date of this letter. If this is done, you will receive your back pay award shortly thereafter.

If you do not execute the receipt and release and deliver it to Gulf within 45 days from the date of this letter, it will be presumed that you do not wish to accept the offer contained in Gulf's letter of May 1, 1976. Any award you might receive as a result of the above mentioned lawsuit will depend upon whether you are included in any class so certified by the Court and whether the class is declared entitled to an award of back pay by the Court.

Clerk, U.S. District Court,
Eastern District of Texas

MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS

[Caption Omitted in Printing]

Filed July 6, 1976

Plaintiffs hereby respectfully move that the Court grant them and their counsel permission to contact and interview members of the proposed class in this action, and to declare that the leaflet attached hereto as Exhibit A is within the constitutionally protected rights of the plaintiffs and their counsel. Plaintiffs seek this permission pursuant to this Court's Order of June 22, 1976, attached hereto as Exhibit B, which limited communications with actual or potential class members.

In support of their motion, plaintiffs show the following:

1. The attached leaflet is a constitutionally protected form of political expression. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

2. The leaflet furthers the right of black employees of Gulf Oil Company's Refinery in Port Arthur, Texas to associate for the purpose of being fairly represented in this pending lawsuit. *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 (1964).

3. The ability of plaintiffs and their counsel to present effectively the claims of class members, to discover the case, to define the scope of the issues with greater specificity, and to explain to class members the provisions of the Conciliation Agreement of April, 1976 depends in significant part on their having access to class members.

Such communication is particularly important in view of the 45 day limitation in which affected class members have to respond to the offer of settlement contained in the Conciliation Agreement.

4. Neither the offer of settlement nor the notice set out in Appendix I of the June 22, 1976 Order explains the terms of the Conciliation Agreement.

5. A general order allowing communications is appropriate. It would be impractical and unworkable for plaintiffs to reapply specifically for permission to communicate with particular class members.

6. Plaintiffs feel that the attached leaflet is consistent with Paragraph 2 of this Court's Order of June 22, 1976, i.e., it represents an attempt to assert "a constitutional right to communicate with any member of the class without prior restraint". Because the Order is vague, and for reasons of prudence, plaintiffs find it appropriate to seek this Court's guidance in this matter.

WHEREFORE, plaintiffs respectfully move that the Court grant them and their counsel permission to communicate with class members concerning this action and order that the attached leaflet is a constitutionally protected activity.

[Signatures Omitted in Printing]

EXHIBIT A

ATTENTION
BLACK WORKERS
OF GULF OIL

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN*. These lawyers will talk to you *FOR FREE*:

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS

[Caption Omitted in Printing]

I.

PRELIMINARY STATEMENT

This action is instituted pursuant to Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. § 1981. The Complaint, filed on May 18, 1976, alleges a class action on behalf of (a) all black employees employed by defendant Gulf Oil Company's Refinery of Port Arthur, Texas, (b) all black employees formerly employed by the defendant in Port Arthur, Texas, and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said Company.

II.

STATEMENT OF FACTS

On June 22, 1976, the Honorable Joe J. Fisher entered an Order limiting communications with any potential and actual class members who are not formal parties to this action. This Order does not forbid communication initiated by a client or prospective client and excepts constitutionally-protected communications with any member of the class without prior restraint. The latter exception is subject to the qualification that the Court must be notified of the substance of such communications within five days after the communication.

The June 22 Order permits Gulf Oil to proceed under the terms of the April 14, 1976 Conciliation Agreement. Gulf Oil is now able to continue offering back pay awards and releases to its employees who are covered by the Conciliation Agreement. Affected employees will have 45 days in which to accept the back pay awards. At the expiration of 45 days, the offers will expire.

III.

ARGUMENT

The plaintiffs' unqualified contention that there should be no restrictions on the actual and potential class members to this action to be fully informed of their rights has been addressed in the previous memoranda submitted to this Court on June 10 and 17, 1976. The arguments advanced therein are specifically incorporated into this memorandum, along with the affidavits accompanying the June 17th memo. An unfettered opportunity to communicate generally with proposed class members is made even more imperative when viewed in terms of the significance of the purported waivers. As a condition to the receipt of a back pay award, an eligible member of the affected class must execute a blanket waiver of all claims of racial discrimination against Gulf Oil occurring on or before the date of the release, or which might arise as the result of future effects of past or present employment practices. In essence, an affected employee or former employee is being asked to relinquish the right to be free from all forms of racially discrimniatory employment practices at Gulf; additionally, he is being asked to surrender his right to sue in order to vindicate civil rights which have been deemed

to be of high public importance. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Alexander v. Gardner Denver*, 415 U.S. 36 (1974); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The waivers are a transparent attempt to frustrate the effectuation of an important Congressional policy against racial discrimination in employment, "one of the most deplorable forms of discrimination known to our society." *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

Because the waivers may possibly serve to undermine[1] important individual and class rights and public policy considerations, affected class members must be informed of their right to seek counsel. Their right to seek the advice of attorneys is incontestable. See *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar*, 389 U.S. 217 (1967); *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971). Professional legal advice is especially important, also, because of the complicated legal and factual questions involved in fair employment litigation. The defendant has the benefit of legal practitioners. In contrast, the purported class members in this action are left to speculate on a proper course of action. For instance, the waiver is not accompanied by a copy of the Conciliation Agreement, nor does it seek to explain to a worker the structural changes, if any, contemplated by the Agreement. Rather than seeking to inform the workers so that intelligent and knowing decisions could

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1. The plaintiffs do not in any manner concede the legal efficacy of the waivers. The validity of these waivers will have to be subjected to judicial scrutiny during the consideration of the merits of this litigation.

be made, the waivers dissuaded fruitful discussions of the matter.

In its Memorandum In Support of Gulf Oil Companys' Motion To Modify Order (p. 4) and during the June 11, 1976 hearing on this Motion, the defendant asserted that a limitation on communications would enable affected employees to "make their sum independent decisions concerning the acceptance of the back pay award". It appears eminently proper that before such "independent decisions" can be made, black workers and their counsel should be allowed to communicate. Gulf Oil will communicate with all of the affected members who fall eligible under the terms of the Conciliation Agreement. This communication will include a notice extending an offer to back pay on the condition that an employee execute, within forty-five days, a release which would waive all of the employees' claims against Gulf Oil. Even though this communication may be supervised by this Court, it would be manifestly inequitable to allow Gulf Oil to so communicate while barring plaintiffs and their counsel from representing or advising these individuals with respect to the provisions of the Conciliation Agreement as well as any other aspect of employment discrimination. Plaintiffs and their attorneys have every intention of representing the best interests of the class. As the incorporated affidavits point out, plaintiffs' attorneys are knowledgeable and skilled in fair employment litigation, and have not accepted any fee for their legal representation.

Plaintiffs feel that the leaflet attached to the motion as Exhibit A is within the range of permissible activity sanctioned by the June 22, 1976 Order. However, in the interest of staying within ethical boundaries and pro-

tecting ourselves from contempt citations, plaintiffs and their counsel seek an order allowing distribution of the leaflet and opportunities to interview proposed class members. It is felt that an offer to communicate to the plaintiffs their rights under the fair employment laws, the relief provided by the Conciliation Agreement, and the possible consequences of signing the general waivers is a reasonable undertaking in view of the factors listed above, especially when the confidentiality of these discussions under the attorney-client relationship will be zealously guarded.

IV.

CONCLUSION

Plaintiffs and their counsel should be permitted to communicate generally with actual and potential class members employed by Gulf Oil Company since the denial of this request would unreasonably restrict counsels' right to practice law and the right of the named plaintiffs and proposed class members to counsel of their own choosing. It is important that the usual protection of confidentiality between attorney-client communications be afforded here. Moreover, denial of the motion would abridge the rights of freedom of speech and freedom of association to plaintiffs' counsel, the named plaintiffs, and members of the proposed class.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

MEMORANDUM ON BEHALF OF GULF OIL CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS

[Caption Omitted in Printing]

Filed July 15, 1976

On July 6, 1976, the Defendant Gulf Oil Corporation (hereinafter referred to as Gulf) was served with Plaintiffs' Motion for Permission to Communicate with Members of the Proposed Class. Attached to Plaintiffs' Motion was "Exhibit A" which contained a statement which Plaintiffs' counsel seeks to have distributed to an undesignated group of "black workers of Gulf Oil". (Plaintiffs' Exhibit A to its Motion will hereinafter be referred to as "the proposed leaflet"). The Plaintiffs do not disclose how the proposed leaflet will be distributed to the unidentified group of "black workers of Gulf Oil".

The Plaintiffs contend that the distribution of the proposed leaflet is consistent with the Court's order dated June 22, 1976, which placed strict limits on communications concerning this action between all parties thereto, their counsel and any potential or actual class member not a formal party to the action. Apparently, the Plaintiffs seek to assert this Motion pursuant to the portion of the Court's order which allows communications with potential or actual class members when such proposed communications are presented to the Court in writing pursuant to a formal motion and proposed order. However, the Plaintiffs have not complied with the terms of the order since it provides "any such proposed communica-

tion shall be presented to this Court in writing *with a designation of or description of all addresses* and with a motion and proposed order for prior approval by this Court of the proposed communication". The Plaintiffs' attorneys have not provided a designation or description of all addresses who are to receive the leaflet.

More importantly, the proposed leaflet falls directly within the scope of those communications which are strictly forbidden by the Court's order. The communications strictly forbidden by the order are as follows:

> "(a) Solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action;
>
> (b) Solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;
>
> (c) Solicitation by formal parties to the class action or request by class members to opt out in class actions under subparagraph (b)(c) of Rule 23, F. R. Civ. P.; and
>
> (d) Communications from counsel or a party which may tend to misrepresent the status, purposes and affects of the class action, and of any actual or potential court orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The proposed leaflet which the Plaintiffs seek to have distributed to the undesignated group of black employees falls within one or more of the above forbidden communications. Although the proposed leaflet does not ex-

pressly state that its purpose is to solicit directly or indirectly legal representation of the person receiving the leaflet, language in the proposed leaflet tends to suggest that the attorneys in this case already represent all "black workers of Gulf Oil". The second paragraph of the pamphlet states, "These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Company* which was filed in Beaumont in Federal Court on behalf of all of you." Until this Court determines otherwise, it is impossible to know whom the Plaintiffs represent in this case. Certainly it cannot be said that the Plaintiffs represent all persons who will receive a copy of this leaflet. Even if it can be assumed that the leaflet will be distributed to "black workers of Gulf Oil" it cannot be said that the Plaintiffs in this suit represent all of those individuals unless and until the Court so rules. Consequently, the proposed leaflet not only tends to solicit directly or indirectly the legal representation of all "black workers of Gulf Oil"; but it misrepresents to them that they are indeed already represented by the Plaintiffs in this case.

The Court's order forbids the distribution of this leaflet in that it "may tend to misrepresent the status, purposes and effects of the class action and of any actual or potential Court orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court or the administration of justice." It can be seen from the above paragraph that the proposed leaflet tends to misrepresent the fact that all "black workers of Gulf Oil" are being represented by the Plaintiffs' attorneys in this suit. First, the huge letters at the top of the leaflet which states "Attention

Black Workers of Gulf Oil" misrepresents a material fact. The leaflet indicates that the company (Gulf) has asked all of the "black workers of Gulf Oil" to sign a release. This is not the case. Only those black employees who have received benefits under the Conciliation Agreement have been asked to sign a release. There are other black workers at Gulf's Port Arthur Refinery who have not been asked to sign a release since they did not receive benefits under the Conciliation Agreement. More importantly, however, the leaflet does not indicate that the controversy before this Court is limited only to black employees at Gulf's Port Arthur Refinery. If copies of the leaflet happen to be "passed on" to black workers at the hundreds of Gulf installations throughout the United States a great amount of confusion could result. If this happens, it may become necessary to clarify the misrepresentations made in the proposed leaflet by sending letters to all black workers of Gulf Oil Corporation in the United States in an effort to clarify the situation. Certainly, the parties to this suit do not wish to burden the Court with such possibilities.

The second sentence of the proposed leaflet indicates that if a "black worker" signs a release, he may be giving up "very important civil rights". This statement absolutely misrepresents the facts in this case and would create impressions which would reflect adversely upon the benefits which have been negotiated on behalf of black employees at Gulf's Port Arthur Plant by two Federal Agencies, the Equal Employment Opportunity Commission and the Office of Equal Opportunity. Furthermore, the notice tends to reflect adversely upon the Court's order which required the Clerk to send notices to the potential class members informing them that they may accept the benefits under

the Conciliation Agreement. The individuals who would receive a copy of the leaflet may get the impression that the Court has ruled that by signing the release important civil rights have been given up. Such misrepresentations and impressions are expressly prohibited by the Court's order dated June 22, 1976.

It can be seen from this discussion that the proposed leaflet is the type of communication which the Court's order specifically sought to prevent. It is the type of communication which will serve to confuse, misrepresent, and distort the issues involved in this lawsuit in addition to having the potential effect of confusing "black workers" at other Gulf facilities in Texas and across the United States.

Turning now to the Memorandum in Support of the Plaintiffs' Motion for Permission to Communicate with Members of the Proposed Class, several erroneous statements must be corrected. The Plaintiffs indicate that the affected class members do not have the right to seek advice of attorneys. This is an inaccurate statement since the Court's order specifically allows "communications between an attorney and his client or a prospective client, who has on the *initiative of the client or prospective client* consulted with, employed or proposed to employ the attorney". Consequently, any member of the potential or actual class may *on his own initiative* consult with or seek the advice of any attorney. The Plaintiffs request to distribute the proposed leaflet is just another attempt on their part to make unqualified statements regarding the purposes and effects of this lawsuit to unsophisticated black employees whose rights have been protected by the combined efforts of two Federal Agencies. Furthermore,

all potential class members in this case received a copy of the Court's order which informed them that they may communicate with an attorney concerning this case if they take the initiative to contact that attorney.

With reference to Gulf's previous statement that the affected employees should be able to "make their own independent decisions concerning the acceptance of the back pay award", the Plaintiffs state that it appears "imminently proper" that before such "independent decisions" can be made, black workers and their counsel should be allowed to communicate. It is abundantly clear to Gulf and it should be abundantly clear to the Plaintiffs in this case that the Court's order does not prevent anyone from communicating with their counsel. Gulf does not understand why the Plaintiffs continue to raise this issue when the issue has been covered by the express terms of the Court's order.

The Plaintiffs state that Gulf will communicate with all potential class members since it will be sending a "notice" extending an offer of back pay on the condition that an employee execute, within 45 days, a release which would waive all the employee's claims against Gulf. It goes without saying that the notice to which the Plaintiffs refer was one ordered to be sent by the Court under signature of the Clerk of Court to the potential class members. Gulf has not sent notices of the potential class members. Gulf is bound by the terms of the Court's order just as are the Plaintiffs. Gulf has no greater right or no lesser right to communicate with potential class members than do the Plaintiffs and their counsel.

CONCLUSION

For the reasons stated herein, Plaintiffs' Motion for Permission to Communicate with Members of the Proposed Class should be denied.

[Signatures Omitted in printing]

[Certificate of Service Omitted in printing]

AMENDED COMPLAINT

[Caption Omitted in Printing]

I.

NATURE OF CLAIM

1. This is a proceeding for declaratory and preliminary injunctive relief and for damages to redress the deprivation of rights secured to plaintiffs and members of the class they represent by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

II.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343 (4), 42 U.S.C. § 2000e-5(f), 2201 and 2202, this being a suit in equity authorized and instituted pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, and 1964, 42 U.S.C. §§ 2000e *et seq.* The jurisdiction of this Court is invoked to secure the protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e *et seq.*, providing for injunctive and other relief against discrimination in employment on the basis of race and (b) 42 U.S.C. § 1981 providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

III.

CLASS ACTION

3. Plaintiffs bring this action on their own behalf,

and pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure as a class action on behalf of those similarly situated. The members of the class and/or subclasses represented by plaintiffs are: (a) all black employees employed by defendant Gulf Oil Company in Port Arthur, Texas; (b) all black employees formerly employed by Gulf Oil Company in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said company. The requirements of the Federal Rules are met in that:

a. The members of the class are so numerous that joinder of all members would be impracticable. There are, for example, more than 300 blacks employed by Gulf Oil Company in Port Arthur, Texas;

b. There are questions of law and fact common to the class. It is alleged herein that defendants have discriminated against virtually every black employed by Gulf Oil Company in respect to the terms and conditions of their employment;

c. The claims of the plaintiffs are typical of the claims of the class and/or subclasses;

d. The plaintiffs will fairly and adequately protect the interests of the classes and subclasses. The interests of the plaintiffs are identical or similar to those of the class members;

e. The defendants have acted and refused to act on grounds generally applicable to the class and subclasses, thereby making appropriate final injunctive and declaratory relief with respect to all members of the classes;

f. The questions of law and fact common to the members of the class and subclasses predominate over questions affecting only individual members; a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV.

PLAINTIFFS

4. Plaintiff Wesley P. Bernard is a black citizen of the United States and Port Arthur, Texas. Plaintiff Bernard has been employed at Gulf Oil Company since October 2, 1946. He was hired as a laborer and is presently a boilermaker, having worked at various "helper" positions during his employment at Gulf Oil Company.

6. Plaintiff Hence Brown, Jr., is a black citizen of the United States and Port Arthur, Texas. Plaintiff Brown was hired as a laborer in 1954 and presently works as a truck driver.

7. Plaintiff Willie Whitley is a black citizen of the United States and Port Arthur, Texas. He was hired in 1946 as a laborer and retired in October, 1975, as a utility man, a classification slightly above a laborer classification.

8. Plaintiff Rodney Tizeno is a black citizen of the United States and Port Arthur, Texas. Plaintiff Tizeno was hired originally as a laborer and is presently a craftsman at Gulf Oil Company.

9. Plaintiff Willie Johnson is a black citizen of the United States and Port Arthur, Texas. Plaintiff Johnson was hired as a laborer at Gulf Oil Company.

V.

DEFENDANTS

10. Defendant Gulf Oil Company in Port Arthur, Texas (hereinafter simply Gulf Oil) is a corporation incorporated and/or doing business in the State of Texas. It operates and maintains a manufacturing plant in Port Arthur, Texas which produces a variety of oil and petroleum products and by-products. Gulf Oil is a corporation engaged in interstate commerce, employing more than fifteen persons, and is an employer within the meaning of 42 U.S.C. §§ 2000e-(b).

11. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 and Oil, Chemical, and Atomic Workers International Union are recognized as the exclusive bargaining representatives of operating and maintenance employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions and terms of employment. Local Union No. 4-23 and the Oil, Chemical, Atomic Workers International Union are labor organizations within the meaning of 42 U.S.C. § 2000e-(d), (e).

VI.

STATEMENT OF FACTS

12. Black employees of Gulf Oil are, and have in the past, been victims of systematic racial discrimination by defendants Gulf Oil and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. Prior and subsequent to July 2, 1965, Gulf Oil engaged in policies, practices, customs and usages made unlawful

by Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) and 42 U.S.C. § 1981 which discriminate or have the effect of discriminating against plaintiffs and the classes they represent because of their race and color.

13. The methods of discrimination include, but are not limited to, intentionally engaging in the following practices:

a. Hiring and Assignment: Gulf Oil unlawfully has assigned and continues to assign a disproportionately large number of black employees to the Company's lowest paying, least preferred, and more physically demanding jobs;

b. White employees are given preference in initial employment and job assignments by Gulf Oil. The company utilizes a battery of tests which discriminates or has the effect of discriminating against blacks in initial employment with the Company. In addition, Gulf Oil maintains a high school diploma requirement and, on information and belief, other pre-employment criteria which discriminate or have the effect of discriminating against black applicants. Because of discrimination in hiring and job assignment, a disproportionately large number of whites have been preferentially hired by Gulf Oil for higher paying jobs than blacks with substantially the same or better qualifications. Black employees are now, and have in the past, been paid less money for harder work under less desirable working conditions than their white counterparts;

c. The use of a pre-employment test battery is legally deficient in one or more of the following ways:

(1) it is not professionally developed; (2) it has little or no relationship to successful job performance; (3) it has little or no relationship to the job sought or applied for; (4) it exhibits a racial and cultural bias against blacks;

d. Defendant Company employs a disproportionately small number of blacks in permanent craft positions. Blacks have been historically excluded from higher paying craft positions by Gulf Oil;

e. Gulf Oil has failed and/or refused to promote black employees and "helpers" to journeymen positions, irrespective of their ability to perform the job or position sought.

f. As a result of the Company's racial promotion and upgrading practices, "black" lines of progression, job classifications and departments have been artificially established and developed with the result that blacks have been and are now confined to the lower-paying and less-preferred jobs than are their white counterparts;

g. Black employees have been denied training, access and exposure to craft positions and other instructions which are necessary to an upgrade or promotion. Blacks who perform the same or comparable work as whites are given unequal pay and compensation;

h. Gulf Oil discriminatorily assesses discipline and discharge against black employees for reasons which would not be grounds for discipline or discharge of whites in similar positions.

14. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 has agreed to, acquiesced in or otherwise condoned the unlawful employment practices referred to in paragraphs VI (13) (a-h), *supra.*

VII.

EXHAUSTION OF REMEDIES

15. Neither the State of Texas nor the City of Port Arthur has a law prohibiting the unlawful practices herein alleged.

16. All jurisdictional prerequisites to this action have been satisfied. This action is timely commenced under both 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981.

a. Plaintiff Wesley P. Bernard filed Charge No. AU7-6-535 with the Houston Equal Opportunity Commission District Office on June 24, 1967. His Notice of Right to Sue, attached to the Complaint as Exhibit A was issued on June 11, 1976.

b. Plaintiff Hence Brown, Jr. filed Charge No. AU7-6-540 with the Houston Equal Employment Opportunity Commission District Office on June 24, 1967. His Notice of Right To Sue, attached hereto as Exhibit B, was issued on June 11, 1976.

VIII.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and the classes represented pray as follows:

A. That this Court formally determine, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, that this action is maintainable on behalf of the class and/or subclasses described in paragraph III (3), *supra*.

B. That this Court issues affirmative relief as follows:

a. that Gulf Oil be required to institute an active recruitment policy;

2. That Gulf Oil be required to canvass the qualifications of all its black employees with the goal to promote all such qualified employees and to eliminate all present effects of past racial discrimination with the following provisions:

a. that plaintiffs and the classes be afforded full utilization of company seniority in bidding for or seeking better paying and more desirable jobs;

b. restructuring lines of progression, revision of applicable residency requirements, advanced level entry, and job skipping at Gulf Oil Company;

c. training and other assistance as necessary to enable the plaintiffs and the class to overcome the effects of past discrimination;

d. an award of back pay to each plaintiff and class member for any financial losses suffered by plaintiffs and the classes and which are attributable to acts of racial discrimination complained of herein;

e. rate protection sufficient to assure that black employees will not be economically discouraged, prevented or penalized in their efforts to attain their rightful place in Gulf Oil's employment structure;

f. prospective red circling to alleviate the residual effects of any racial discrimination not corrected or completely removed by this action;

g. Gulf Oil be required to suspend the use of any and all tests or other criteria for promotion or for initial employment until said tests or criteria are validated in accordance with the Equal Employment Opportunity Commission Guidelines on Testing;

h. that the defendant Union, Local 4-23, be required to file all grievances of its black members of Gulf Oil;

i. enter a declaratory judgment that the acts and practices complained of are in violation of the laws of the United States;

j. that plaintiffs and the classes they represent be awarded their complete costs of this action, including a reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k);

k. grant plaintiffs and the classes they represent such other and further relief as may be necessary and proper.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Exhibit "A"

[Caption Omitted in Printing]

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES,
District Director
Equal Employment Opportunity Commission

June 11, 1976
Date

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Exhibit "B"

[Caption Omitted in Printing]

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES, June 11, 1976
District Director Date
Equal Employment Opportunity Commission

ORDER

[Caption Omitted in Printing]

Filed August 10, 1976

Having considered Plaintiffs' Motion for Permission to Communicate with the Proposed Class:

IT IS ORDERED that the Motion is hereby denied.

JOE J. FISHER
United States District Judge

REPORT TO THE COURT BY GULF OIL CORPORATION OF INDIVIDUALS WHO HAVE ACCEPTED BENEFITS UNDER THE CONCILIATION AGREEMENT

[Caption Omitted in Printing]

Filed September 2, 1976

Pursuant to paragraph (9) of the Court's Order dated June 22, 1976, Gulf Oil Corporation, hereinafter referred to as "Gulf", hereby makes this report to inform the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who hve refused or failed to respond. The Conciliation Agreement referred to is that entered into on April 14, 1976, between the Equal Employment Opportunity Commission, the Office for Equal Opportunity and Gulf.

In accordance with paragraph (4) of the Court's Order dated June 22, 1976, Gulf delivered a notice to the Clerk of Court for mailing to all employees of Gulf at its Port Arthur Refinery who were covered by the Conciliation Agreement and who had not signed receipts and releases for back pay awards thereunder informing them that they had 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court. The notice from the Clerk of Court was dated June 30, 1976, and was mailed to all individuals entitled to benefits under the Conciliation Agreement who had not previously

signed receipts and releases. The notice was not sent to female employees or heirs of deceased employees who were entitled to benefits under the Conciliation Agreement because they were not actual or potential members of the proposed class as defined by the Complaint in this suit.

Attached hereto as Exhibit A is a list of individuals who have accepted the benefits of the Conciliation Agreement by signing receipts and releases indicating their acceptance.

Attached hereto as Exhibit B is a list of individuals who are entitled to benefits under the Conciliation Agreement and who have failed to accept those benefits by signing receipts and releases.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

EXHIBIT A

Employees' Names

1. Herman M. Alexander
2. Willie Brent
3. Raymond J. Fisk
4. Joe A. Hill
5. Isaac Linden, Jr.
6. Joseph E. Londow
7. Robert Londow
8. Chester A. Vital
9. Earl L. Williams
10. Elcide Davis
11. Clarence Adams
12. Silas Addison
13. Donald Albert
14. Joseph Alexander, Jr.
15. Ivory J. Alexis
16. Abraham Allen
17. Vincent J. Allen
18. John N. Alpough
19. Thaddeus Alpough
20. Theoudile Alpough
21. John Amy
22. Henry Andrepont
23. Francis Andrus
24. Clayton Antoine
25. Dalton Antoine
26. Kermit W. Baker
27. Reginald H. Baker
28. John C. Batiste
29. John Beard
30. L. P. Beckett
31. Clarence Bell
32. Willis Boatman
33. Joseph Bobb, Jr.
34. Oscar W. Boudreaux, Jr.
35. James A. Bowden
36. Harry C. Bradley
37. Herman Bray
38. Manuel Breaux
39. Orren Brew
40. Abraham Briscoe, Jr.
41. Jesse J. Brooks
42. Hence H. Brown
43. James C. Bryant
44. Thomas R. Bryant
45. Irvin Buckner
46. Bernard Bush
47. Gilbert Cannon
48. Edgar Chambers
49. Junius Chaney
50. Arthur Charles, Jr.
51. Henen Charles
52. Louis Chillow, Jr.
53. Eddie Christentary
54. James Clark
55. Cornelius Collins
56. Earnest Collins
57. James Collins

58. Launy Collins
59. Rodney Collins
60. Joshua Comeaux
61. John Conner
62. Leroy Conner
63. Henry Cosey
64. Jessie Davis
65. Junius M. Day
66. Morris D. Deese
67. James Diggles
68. Lloyd Dixon
69. Vivian Dumas
70. Johnnie Dunn
71. Oscar M. Dwin
72. Ervin Edwards
73. Robert Edwards
74. Willie Edwards, Jr.
75. Lee V. Eli
76. John Ellas, Jr.
77. Louis Esbry, Jr.
78. Lonnie Eulian
79. Amos J. Evans
80. Tony Evans
81. Theado Felder
82. Fred B. Field
83. Shelton Fontenot
84. Herbert J. Fontnette
85. Ed Foreman
86. Jesse C. Foreman
87. Percy Forward
88. Lyles J. Francis
89. Raymond Freddye
90. Philip Frelot
91. Manuel Gasper
92. Irving Gerard
93. Wilbert Getwood
94. Abraham L. Gilbert
95. Curtis L. Gill
96. Lee A. Giron, Jr.
97. Clifton Glasper
98. Willie Glover
99. Paul Goings, Jr.
100. James W. Gordon
101. Ray Gordon
102. Ruby Gordon
103. Rufus Granger
104. Leroy Grant
105. Thomas J. Green
106. Lawrence L. Gregoire
107. Allen Griffin, Jr.
108. Johnny Guice
109. Jean D. Guidry
110. Isaac Gunner
111. Lionel Gunner
112. Edward Hall
113. James Hammond
114. Amos Harris
115. Anderson Harrison
116. Alfred T. Hawkins, Jr.
117. Henry Haynes
118. Samuel Heath
119. Lloyd J. Hebert
120. Berkley A. Henderson
121. Lenton B. Henderson
122. Waldore W. Henderson
123. John C. Hennington

124. Harrison Hill
125. F. E. Hollins
126. Alex Hubbard
127. Willie Hughes
128. Joseph Huston
129. Welby Ina
130. Carey Ivory
131. Lawrence Jackson
132. Ernest Jacobs
133. Furbin M. Jacobs
134. Phillip L. Jacquet
135. Joseph H. Jefferson
136. Leroy Jenkins
137. Alfred Joe, Jr.
138. Cleveland Johnson
139. Mitchell Johnson
140. Odell Johnson
141. Thomas Johnson, Jr.
142. William Johnson
143. McZeal Joiner
144. Hardiness Jones
145. Lee T. Jones
146. Willie Jones
147. Eddie Joseph, Jr.
148. Warren Joseph
149. Wilford Julien
150. James Keller
151. James Keller
152. Lawrence LaFleur
153. Joseph O. Landry
154. Sterling Landry
155. Johnnie Langford
156. Robert L. Lavergne
157. Milton Lavine
158. Arthur Lawrence
159. Shelby Lee
160. Clarence Lendon
161. Joseph L. Lewis
162. Eddell Lightfoot
163. Earl Linton
164. Norris Louviere
165. Thomas D. Luse
166. Louis J. Lyons
167. Willard Lyons
168. Eugene Maden
169. Howard Mader
170. Damon Magadeny
171. Frederick W. Malbrue
172. Warren Marks
173. Joseph W. Marsh
174. Morris Martin
175. Edmond Matthews
176. John McClenon
177. Robert McCree, Jr.
178. Herbert A. Mearlon
179. Allen Miles
180. Thomas Miles
181. Isaac Miller
182. Lemon Miller
183. Jasharia Minard
184. Willington Mingo
185. Arnesta A. Mitchell
186. Joseph J. Mitchell
187. Lumos K. Mitchell
188. Eddie C. Monroe, Jr.
189. Robert L. Mosley

190. Clarence Moss
191. Earnest M. Newman
192. Elton Nickles
193. Clifton Nurse
194. Leo Oderbert
195. Delard Parker
196. Henry Parker
197. Willie Parker
198. Hamilton Paul
199. James R. Paul
200. Landry Pete
201. Wilson Phillips
202. Murphy J. Pickney
203. Oliver Plumbar
204. Royal Posey
205. Isaac Prejean
206. Sidney Prevost
207. Lawrence Prince
208. Wallace Ransom
209. Norman Ratcliff
210. Wilson Ratcliff
211. Adam Reado
212. Arthur Reado
213. Charlie Reynolds
214. Henry Robertson
215. Arthur Robinson
216. Charlie Robinson
217. Jessie Rogers
218. Leroy Ross, Jr.
219. Wm. T. Sanderson, Jr.
220. Lester Seales
221. Lawrence Sharffet
222. Murray Shedrick
223. George Shields, Jr.
224. Warren Simmons
225. Elster Simon
226. Lee Simon
227. Roosevelt Simon
228. Clifton Sinegal
229. Cleveland Sinegal
230. Frank Smith
231. Henry Smith
232. Lloyd Smith
233. Wilbur Smith
234. Oguster Snowden
235. Leonard Sostand
236. Hillery Starks, Jr.
237. Joseph A. Stelley
238. Ransom S. Strawder
239. Cornelius N. Taylor
240. Israel Taylor
241. Joseph Theall
242. John B. Thibodeaux
243. Alphonse Thomas
244. Levy Thomas
245. Landry Thomas
246. Roland Thomas
247. Joseph R. Thompson
248. Fred Trice
249. Herman Turner
250. Sterling Turner, Jr.
251. William Vaughn
252. Freddie Veltz
253. James Walker
254. James Wallace
255. Louis J. Warrick

256. David Washington, Jr.
257. Jimmie Washington
258. James C. Washington
259. Paul C. Washington
260. James D. Watts
261. Fred Welch
262. James W. West, Jr.
263. Chester Whitley
264. Chrystal Wide
265. Clarence A. Williams
266. Calvin H. Williams
267. Ervin Williams, Jr.
268. George Williams, Jr.
269. Henry Williams
270. Lawrence C. Williams
271. L. V. Williams
272. Robert Williams
273. Walter Williams, Jr.
274. Columbus Wilson
275. Lester Wycoff
276. Jeff Alfred
277. Joe M. Allen
278. Burvin Anderson
279. Herman Anderson
280. James Bailey, Jr.
281. Sam Baker
282. Walter Ballard
283. Roosevelt Batiste
284. Otis J. Beasley
285. Upshy Bell
286. Henry Bessard
287. Sherman Beverly
288. Joe Bob
289. Ken R. Bonnie
290. Parker Botley
291. Frank I. Boutte
292. Clarence Bridges
293. Vinson Briscoe
294. Clarence Broussard
295. Paul D. Broussard
296. Herman Brown
297. Willie Bryant
298. Wilton Bryant
299. Burnell Buchanan
300. Rawlin G. Bush
301. Willie D. Bush
302. Willie Campbell
303. Freddie Carter
304. Fred D. Carter
305. Willie Charles
306. Joseph L. Clark
307. Lawrence Clayton
308. Frank H. Coleman
309. Van Coleman
310. Irvin Collins
311. Milton Collins, Jr.
312. Willie R. Collins
313. Ellis Comeaux
314. Freddie Comeaux
315. Leander Como
316. Clarence Conner
317. Gussie Cooks
318. Willie Cross
319. Isiah Daniel
320. Sampson Daniel
321. Hillard David

322. Cleveland Demartha
323. George Douglas
324. Willie Douglas
325. Louis Dugas
326. Clovis Duhon
327. Paul Duhon
328. Charlie Dupree
329. Ernest H. Edwards
330. Price Edwards
331. Lester Elmore
332. Wilbur T. Eugene
333. Frank Fennis
334. Allen Filer
335. Bennie Francis
336. Junius J. Francis
337. Morris Francis
338. Roy Francis
339. Wilford Francis
340. Germain Francois
341. Antewine Franklin
342. Norman Frelow
343. Lee A. Giron
344. Mose Gistand
345. Willie Gloston
346. William Gobart
347. Timothy Jones
348. Talmage Jones
349. Roy Joseph
350. Lawrence Keal
351. Ora L. Landry
352. Joseph F. Langlinais
353. Charley Lee, Jr.
354. Robert Lee
355. Albert Lewis
356. John Lewis
357. James Lewis
358. Joseph Lewis
359. Paul Lewis
360. Domingue Londow
361. Albert Malvaux
362. Willie Marks
363. Dock Martin
364. Mose Martin
365. Ervin McGee
366. Ernest M. Miller
367. Frank Mills
368. James F. Moore
369. Curtis Morris
370. Lloyd Gordon
371. Rayfield Gordon
372. Lee Gradney
373. Adam Granger, Jr.
374. Nathan Granger
375. David Green
376. Morris Guidry
377. Whitney Guidry
378. Willie Hall
379. George Hardeman
380. Washington N. Harrison
381. Lemon Harmon
382. Ormes Heath
383. Albera Henry
384. Joseph Hill
385. Leroy Horton
386. Albert Jacko

387. Rufus Jenefor
388. Glancy Johnson
389. Stanford Johnson
390. Wesley Johnson
391. Willie Johnson
392. Zedekiah Johnson
393. Albert Jones
394. Claude Jones
395. Sylvester Jones
396. Burges Morrow
397 Dempsey Morrow
398. Moses Mouton
399. Robert B. Mouton
400. Henry Nezy
401. George Ogletree
402. Charles Olivier
403. Eddie Pierre
404. Hannable Pierre
405. Jean Pierre
406. Calvan Polite
407. Leo Randall
408. Homer Richard, Jr.
409. Martin Richard
410. Prevol Rideau
411. Granville Robinson
412. Joe Rogers
413. Harry Ruffin
414. Preston Sampson
415. Paul Scipion
416. C. Arch Seale
417. Leo Segura
418. Charlie Shaw
419. Isaac Shedrick
450. Isaiah Washington
421. Stanley Sias
422. Aaron Simmons
423. Leon Simon
424. Bob Simpson
425. Prejean Sinegal
426. June Smith
427. Burnis Solomon
428. Fred Stephenson
429. Effery A. Syers
430. John Syers
431. Preston Syers
432. Lee Thomas
433. Arthur Thompson
434. James T. Thornton
435. James Towers
436. Renard Trahan
437. O. D. Trainer
438. Aron Van Wright
439. Hamilton Viltz
440. Murphy N. Vital
441. Philmore Vorise
442. Joseph D. Wagner
443. Harold Walker
444. Sherman Walker
445. Ralph F. Walters
446. Steven Walters
447. Frank Ward
448. Burnes Washington
449. Dennis Washington
450. Isaih Washington
451. Willie Washington
452. Marcus J. B. Watkins

553. Overton West
554. Emery White
555. Sidney White
556. Cravin Williams
557. Clifton Williams
558. Lawrence Williams
559. Oran Williams
560. Tom Williams
561. Curtis R. Wilson
562. O. B. Windon
563. David Worthy
564. Raymond J. Rose
565. Jessie R. Sparks
566. Theodore R. Sanderson*

* The release was received on 8/25/76, 12:47 p.m., but it was not processed because of the Court's Order.

EXHIBIT B

Employees' Names

1. Joseph Starring
2. Russel Abbs
3. Howard Adams
4. Edward Benjamin, Jr.
5. Irvin Bob
6. Vernon D. Booker
7. Glen Branch
8. Cuthers Broaden
9. Hamilton Carmouche
10. Lawrence Carriere
11. Herman Carter
12. Joseph Castille
13. Anthony Clark
14. Daniel Clark
15. Willie Conway
16. Squire Crawford
17. John Francis
18. Isaiah Frank
19. Raymond J. Gilbert
20. Robert Gordon
21. Acy Graham
22. Haywood Green
23. Clyde Harrington
24. Thomas J. Harris
25. Fred H. Hudson
26. Illinois W. Johnson
27. Fred Jones
28. Frank Jones
29. Leroy Jones
30. Willie Jones, Jr.
31. Clarence Kennerson
32. David A. McKenzie
33. Lee Medford
34. George Melancon
35. James R. Newman, Jr.
36. Carley Sam
37. William Santee
38. Joseph W. Saulsberry
39. Willie L. Scott
40. Ollie J. Smith
41. Albert Sweet
42. Herman Walker
43. Freddie White
44. Alphe Williams, Jr.
45. Dennis Williams
46. Earl Williams
47. Howard Martin
48. Ora Queen
49. Anton Amy
50. Leroy Bell
51. John B. Burrell
52. Willie Johnson
53. Earl Nelson
54. Joseph Parker, Jr.
55. Rodnel Senegal
56. Arthur Skillman
57. Willis Smith
58. Wesley Vories
59. Frank Webb
60. Spencer Abron, Jr.

61. Wesley P. Bernard
62. Hence Brown, Jr.
63. John Duhon
64. Thomas Flanagan, Jr.
65. Joseph P. Jacquet
66. Elton Hayes
67. Rodney Tizeno
68. Willie Whitley

ORDER

[Caption Omitted in Printing]

[Filed January 11, 1977]

BE IT REMEMBERED that on this day came on for consideration the Motion to Dismiss of defendant Gulf Oil Company [Gulf], joined in by the defendant Oil, Chemical and Atomic Workers International Union and Local Union No. 4-23 [Unions]. After proper notice to the parties by an Order of this Court, the Motion to Dismiss is to be treated under Rule 56, F.R.Civ.P., because the defendants offered, and the Court accepted evidence extrinsic to the pleadings in the form of affadavits. The parties were allowed more than 10 days to submit any additional pertinent information. Taking into consideration all material presented by the parties prior and subsequent to the decision to treat the Motion as one for summary judgment, the Court must conclude that the Motion is well taken and should be granted in all particulars.

While it is not necesary that all members of a class bring a charge with the Equal Employment Opportunity Commission [EEOC] as a prerequisite to joining as coplaintiff in litigation, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), the class representatives must show that they have complied with the required preliminary administrative steps and timely filed suit in this Court. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). At this stage in the history of Title VII litigation, it goes without saying that a plaintiff who seeks to represent a class may not bring

suit in District Court until he has filed a complaint with the EEOC. 42 U.S.C. § 2000e-5(f) (1974).

The affidavits submitted reveal that neither of the plaintiffs Elton Hayes, Sr., nor Rodney Tizeno has filed a complaint with the EEOC with regard to a discrimination charge against Gulf or the Unions. Thus neither Hayes nor Tizeno may maintain suit in their own right, *Love v. Pulman Co.*, 404 U.S. 522 (1972); *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), and therefore could not adequately represent a class. Rule 23(a), F.R.Civ.P.

Of course this failing should not prevent maintenance of the Title VII portion of this suit as a class action if others of the named plaintiffs have satisfied the jurisdictional requirements and could raise a viable claim here. Unfortunately this is not the case.

Title VII requires that suit be instituted in the District Court within 90 days after notice from the EEOC that

> * * * the Commission has not filed a civil action under this section * * * *or* the Commission has not entered into a conciliation agreement to which the person aggrieved is a party. (emphasis supplied). 42 U.S.C. § 2000e-5(f)(1).

Plaintiffs Willie Johnson, Sr., Wesley Bernard, and Hence Brown received such notice from the EEOC on February 26, 1975, after it was sent the previous day. Plaintiff Willie Whitley's failure of conciliation letter was sent December 4, 1973. The mailing of these letters began the running of the 90 day period for filing a civil action

on the associated claim, under the clear language of the statute set out above.

Unfortunately the EEOC had adopted a troublesome two letter procedure whereby after sending the failure of conciliation notice, it would later issue a "right to sue" letter at the complainant's request. The first letter, however, advised the claimant that he should contact an attorney or request assistance from the EEOC in doing so prior to the issuance of the "right to sue" letter and prepare for suit if desired. The two letter system was entirely a figment of the imagination of the EEOC, since it is not mandated or suggested by 42 U.S.C. § 2000e-5(f). As is ably pointed out by Gulf in its brief, the events which trigger notice are listed in the disjunctive so that the occurrence of any one of the listed events (such as failure of conciliation) and subsequent notice thereof empowers the claimant with the right to bring action in this Court. To hold that the 90 day period did not begin to run until after the claimant requests and receives the second letter would amount to allowing him unlimited discretion in choosing a time for filing suit.

The leading decision to the contrary, *Tuft v. McDonnell Douglas Corporation,* 517 F.2d 1301 (8th Cir. 1975), has not been followed in this Circuit. *See Turner v. Texas Instruments, Inc.,* 401 F.Supp. 1179 (N.D. Texas 1975); *Kelley v. Southern Products,* Civ. No. 19243 (N.D. Georgia 1975); *Barfield v. A.R.C. Security, Inc.,* 9 E.P.D. ¶ 10,136 (N.D. Georgia 1975). Judge Porter's decision in *Turner v. Texas Instruments, Inc., supra,* is most persuasive in its examination of 42 U.S.C. § 2000e-5(f), its legislative intent, and cases decided thereunder. His analysis of the erroneous rationale em-

ployed in cases supporting the two letter system, and the fact that jurisdiction must be construed strictly, *Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973), convinces this Court that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC.

Since this cause was not filed until May 18, 1976, more than 90 days had elapsed from the sending of the failure of conciliation notice by the EEOC. The Title VII claim must be dismised.

Plaintiffs' secondly assert a cause of action under 42 U.S.C. § 1981. Since the claim was the subject of complaints filed with the EEOC in 1967 by three of the plaintiffs, nine years had elapsed before court action on it was initiated. Since the plaintiffs allowed more than two years to run before filing suit, and because the filing of an EEOC complaint does not toll the limitation period, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), any cause of action under § 1981 is barred and must be dismised. Tex. Rev. Civ. Stat. Ann. art. 5526(4). Defendants' reasoning is convincing that all plaintiffs complain of the identical pattern of discrimination which was the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated. Thus, any claim by Tizeno, Hayes and Whitley must be dismissed along with that of Bernard, Brown and Johnson. The Court additionally finds no circumstances of continuous discrimination that would justify application of the principles discussed in *Williams v. Norfolk & Western Railroad Co.*, 530 F.2d 539, 542 4th Cir. 1975); *Johnson v. Railway Express Agency, supra* at

467 n. 13; and *Briggs v. Brown & Williamson Tobacco Co.*, 414 F. Supp. 371, 378 (E.D. Va. 1976).

The Court also acknowledges a most compelling argument for the application of the equitable doctrine of laches in this particular case, based not only on the obvious lack of diligence on the part of the plaintiffs, but a recognition that to put this defendant to the task of obtaining records and locating witnesses after the expiration of such a lengthy period would pose a particularly onerous burden. *Afro-American Patrolmens League v. Duck,* 503 F.2d 294, 299 (6th Cir. 1974). In this regard see the affidavit of C. B. Draper, made a part of the record on October 15, 1976. It is accordingly

ORDERED, ADJUDGED and DECREED that summary judgment be and the same is hereby granted for the defendants in this cause, as to both the class action and any individual claims of discrimination by the plaintiffs.

RENDERED this the 11th day of January, 1977.

/s/ JOE J. FISHER
Joe J. Fisher
U. S. Chief District Judge

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

June 15, 1979.

Employment discrimination suit was brought against employer and unions based on allegation that the employer and the unions had discriminated against plaintiffs and similarly situated black employees in violation of Title VII and of the Civil Rights Act of 1866. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, entered an order prohibiting the parties from communicating with class members without court approval and later granted defendants' motions for summary judgment. Plaintiffs appealed, and the Court of Appeals, Thornberry, Circuit Judge, held that: (1) the 90-day period within which plaintiffs were required to file suit did not begin to run until plaintiffs received notice from the Equal Employment Opportunity Commission both of the failure of conciliation and of the EEOC's decision not to sue; (2) defendants did not meet their summary judgment burden to establish the absence of any material issue of fact; (3) under both Texas and federal law, the date on which the statute of limitations began to run on plaintiffs' claim under the Civil Rights Act of

1866 was the last date on which defendants unlawfully harmed plaintiffs; (4) plaintiffs could recover damages for any wrongful acts committed during the limitations period; (5) the statute of limitations did not totally bar the claim under the Civil Rights Act of 1866; (6) any recovery under the Civil Rights Act of 1866 was limited to those violations occurring within a two-year period immediately preceding the filing of the complaint or thereafter; (7) plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and did not support the application of laches to bar the claim; (8) the order restricting the parties' communication with members of the putative class was a permissible exercise of the district court's discretionary power to control a class action, and (9) the order did not violate plaintiffs' constitutional rights.

Reversed and remanded.

Godbold, Circuit Judge, concurred in part and dissented in part and filed opinion.

James C. Hill, Circuit Judge, specially concurred and filed opinion.

Stella M. Morrison, Port Arthur, Tex., Ulysses Gene Thibodeaux, Lake Charles, La., Charles E. Cotton, New Orleans, La., Barry L. Goldstein, Washington, D.C., Jack Greenberg, Patrick O. Patterson, New York City, for plaintiffs-appellants.

William H. Ng, Atty., Abner W. Sibal, Gen. Counsel, Joseph T. Eddins, Jr., Assoc. Gen. Counsel, Charles L. Reischel, Asst. Gen. Counsel, Equal Employment Oppor-

tunity Commission, Washington, D. C., for E.E.O.C., amicus curiae.

Joseph H. Sperry, Wm. G. Duck, Kathleen M. Civins, Susan R. Sewell, U. S. Jones, Houston, Tex., for Gulf Oil.

Carl A. Parker, Michael D. Murphy, Port Arthur, Tex., for Oil, Chemical & Atomic Workers, Etc.

Appeal from the United States District Court for the Eastern District of Texas.

Before THORNBERRY, GODBOLD and HILL, Circuit Judges.

THORNBERRY, Circuit Judge:

Plaintiffs-appellants in this case are present or retired employees of defendant Gulf and claim that Gulf and the defendant unions have discriminated against plaintiffs and similarly situated black employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court entered an order prohibiting the parties from communicating with class members and later granted defendants' motions for summary judgment.

Plaintiffs Bernard, Brown, and Johnson filed charges of discrimination with the EEOC in 1967 against Gulf and the local union.[1] The EEOC served copies of the

1. Bernard also filed charges against the international union in 1976, but the EEOC dismissed this charge as untimely. Apparently, this was the only charge any of the plaintiffs filed against the international union. Although these facts may have some relevance to the merits of the action or scope of relief against the international union, the parties did not discuss that possibility before this court. Therefore, although the district court may decide differently after further examination on remand, on this appeal we will discuss the issues raised as if they were equally applicable to all defendants.

charge on defendants in August, 1967, and issued a finding of reasonable cause in August, 1968. The EEOC actively pursued conciliation efforts with defendants until February, 1975, at which time it sent plaintiffs a notice stating that defendants did not wish to entertain conciliation discussions and advising plaintiffs that they could request a "Notice of Right to Sue" letter at any time.[2] The EEOC continued conciliation efforts on the basis of a Commissioner's charge filed in September 1967, which raised the same issues charged by plaintiffs. These efforts resulted in a conciliation agreement between the EEOC and Gulf in April, 1976. Plaintiffs filed this suit in May, 1976, and requested the Right-to-Sue letters from the EEOC. The EEOC issued the letters to Bernard and Brown in June,[3] and plaintiffs amended their complaint to reflect this fact in July, 1976.

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2. These first letters stated:
On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company—U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

3. The Right-to-Sue letters stated:
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS
Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may,

Soon after they filed the complaint, plaintiffs' attorneys appeared at a meeting of Gulf employees, during which they discussed this case. As a result of this meeting, Gulf requested the court to enter an order restricting the parties' or counsels' communication with class members. Gulf accompanied this request with an unsworn assertion that plaintiffs' attorneys had told the employees at the meeting it would be against their interest to accept the back pay award offered pursuant to the conciliation agreement. Plaintiffs' attorneys adamantly denied that they had urged the employees to reject the conciliation agreement. The court granted Gulf's motion without making any findings.[4] Defendants then moved to dismiss the complaint. In November, 1976, the court ordered that the motion be treated as a motion for summary judgment, and granted summary judgment for defendants in January, 1977. Plaintiffs raise four issues on this appeal.

I.

[1] The district judge dismissed plaintiffs' Title VII claim because plaintiffs failed to file suit within 90 days of receiving the first letter, which stated that conciliation efforts had failed and that plaintiffs could request a

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within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

4. This order is set out in footnote 9, *infra*.

Notice-of-Right-to-Sue letter. The judge held "that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC." Since the trial court opinion in this case, however, this court has held differently. In *Zambuto v. American Tel. & Tel. Co.*, 544 F.2d 1333 (5 Cir. 1977), a panel of this circuit noted that the statute imposing the 90 day limitation could be read to begin the 90 day period on receipt of a notice that the EEOC has either failed to file a civil action or has not arrived at a conciliation agreement. That court stated, however, that the limitations period does not begin to run until the EEOC has notified the claimant "of both the failure of conciliation and the EEOC's decision not to sue in order to indicate clearly that the administrative process has been completed." *Id.* at 1335. *Accord Turner v. Texas Instruments, Inc.*, 556 F.2d 1349 (5 Cir. 1977); *Page v. U.S. Indus, Inc.*, 556 F.2d 346 (5 Cir. 1977), *cert. denied.*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). Furthermore, the *Zambuto* panel held that the final paragraph of the initial letter infomed Mrs. Zambuto that "the EEOC was awaiting [her] request for issuance of a right-to-sue letter. Implicit in this latter statement is the assurance that the 90 day period would not commence until this letter was requested and dispatched. Because this paragraph declared that further administrative action was contemplated by EEOC, it failed to furnish Mrs. Zambuto (or AT&T) with the form of notice required under § 2000e-5(f)(1) to start the 90 day period for filing suit." 544 F.2d at 1335. Because the two-letter procedure allowed the claimant to postpone filing suit, the *Zambuto* panel declared the procedure invalid. Because the use and wording of the two letters was "patently misleading," however, that panel made its ruling prospective only.

[2] At oral argument, defendants conceded that the present case is directly controlled by *Zambuto* and the cases following it. Plaintiffs filed suit before the *Zambuto* decision, and the letters plaintiffs received are indistinguishable from those involved in *Zambuto, Page* and *Turner.* As in *Turner* and *Page,* the first letter plaintiffs received informed them only that conciliation efforts had failed; it did not indicate that the EEOC had decided not to sue. Also, as in *Page* and *Zambuto,* the concluding paragraph of the first letter assured plaintiffs that the 90 day period would not commence until plaintiffs received the second letter. Because the letters to the plaintiffs in this case were as "patently misleading" as those in prior cases, the 90 day period for filing suit did not begin until receipt of the second letter. Plaintiffs filed suit within this period. Therefore, the district court erred in dismissing the individual Title VII claims of Bernard and Brown. Also, because the claims of these class representatives are properly before the court, the district court erred in dismissing the class claims and the claims of the other named plaintiffs who did not file a complaint with the EEOC. *Wheeler v. American Home Prod.,* 563 F.2d 1233 (5 Cir. 1977); *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496 (5 Cir. 1968).

II.

The district judge also granted summary judgment in favor of defendants on plaintiffs' § 1981 claim. The trial judge found that plaintiffs' complaint alleged only "the identical pattern of discrimination which was the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated." In addition, the court found as a fact that there were no continuing acts of discrimination.

[3-5] Defendants make two arguments in support of this holding. First they assert that the trial court properly granted summary judgment in their favor because plaintiffs failed to respond properly to defendants' summary judgment motion Plaintiffs assert that defendants have discriminated in the past and presently continue to discriminate against blacks in hiring, assignment, promotion, training, recruiting, discipline, and discharge. Defendants argue that "appellants wholly failed to offer factual support for their assertions." Defendants-appellees brief at 18. Defendants misunderstand the summary judgment practice. Under Fed.R.Civ.P. 56, the moving party has the initial burden of proving that there is no genuine issue of material fact. If the movant wishes to dispute the allegations of the complaint, he must do so through affidavits, documents, or other evidence. Unless and until the movant initially provides factual support for the summary judgment motion, the opposing party has no duty to respond to the motion or to present opposing evidence. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210 (5 Cir. 1976). In the present case, defendants presented a great number of affidavits with their summary judgment motion, but in none of the affidavits did defendants deny that they are discriminating against blacks. Therefore, the trial judge's ruling that there were no instances of continuing discrimination was unsupported by the summary judgment record. Defendants, as the parties requesting summary judgment, failed to meet their burden of showing the absence of any material issue of fact.

[6-8] Defendants also argue that even if the facts plaintiffs allege are true, we must dismiss plaintiffs' § 1981 claim. In support of this contention, defendants argue primarily that the applicable statute of limitations is that

provided by Tex. Rev. Civ. Stat. Ann. art. 5526, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5 Cir. 1974), and that under Texas law, the statute of limitations begins to run when the elements necessary for the cause of action first coalesce, regardless of whether defendants later commit other acts of the same nature. Under defendants' theory, the statute of limitations would have expired on plaintiffs' claim two years after defendants began discriminating against blacks, even if defendants continued such discrimination to the time plaintiffs filed this action. This argument is frivolous. Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the *last* date on which defendants improperly harmed plaintiffs. Furthermore, plaintiffs may collect damages for any wrongful acts defendants committed within the limitations period. *E.g., Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 (6 Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 77, 478 F.2d 979, 987 (1973); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5 Cir. 1973); *Alexander & Polley Const. Co. v. Spain*, 477 S.W.2d 301 (Tex. Civ. App.—Tyler 1972 no writ); *Goldman v. Ramsay*, 62 S.W.2d 176 (Tex. Civ. App.—Texarkana 1933 error dism'd). Defendants' reliance on *Kittrell v. City of Rockwall*, 526 F.2d 715 (5 Cir.), *cert. denied*, 426 U.S. 925, 96 S.Ct. 2636, 49 L. Ed.2d 379 (1976), is unfounded. That case turned on the rule, peculiar to trespass cases, that the statute of limitations begins to run on the date when the trespassers first entered the land, even if they continue to use the land after that date. *Baker v. City of Fort Worth*, 146 Tex. 600, 210 S.W.2d 564 (1948). This rule cannot be applied when defendants, as in this case, continue to violate plaintiffs' rights with new and distinct actions.

[9] Therefore, the district judge erred in holding that the statute of limitations totally barred plaintiffs' § 1981 claim. Plaintiffs' cause of action and any recovery they may receive, however, must be limited to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter.

III.

In addition to holding that statutes of limitations barred plaintiffs' claims, the district court "acknowledge[d] a most compelling argument for the equitable doctrine of laches in this particular case. . . ." Because we disagree with the court's ruling on the legal defenses, we find it necessary to discuss this alternative theory in support of the judgment below. *Lowe v. Pate Stevedoring Co.*, 558 F.2d 769, 770 n.2 (5 Cir. 1977).

[10] In *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 406 (5 Cir. 1974), *rev'd on other grds.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), this court held that the doctrine of laches is applicable to Title VII and § 1981 actions brought by private plaintiffs, even if the legal limitations periods have not run. To apply laches in a particular case, the court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced defendants. *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers*, 549 F.2d 1021, 1026 (5 Cir.), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). We conclude that the evidence before the Court on this summary judgment motion does not allow a finding that either of these elements exists.[5]

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5. Which party has the burden of proof on the issues of laches is somewhat unclear. *See* G. Gilmore & C. Black, The Law of Admiralty 771-76 (2d ed. 1975); *Law v. Royal Palm Beach Colony,*

Defendants argue that plaintiffs were aware of their cause of action at least as early as 1967 when they filed their initial charges against defendants with the EEOC. They also assert that plaintiffs could have requested a Notice of Right to Sue from the EEOC and filed a private action in 1970. 35 Fed. Reg. 10006 (June 18, 1970) (currently at 29 C.F.R. 1601.256(1977)). Defendants therefore argue that plaintiffs' failure to file a complaint with the district court until 1976 "shows conclusively that they have slept on their rights." Defendants-appellees' brief at 28. The only justification plaintiffs offer for this nine-year delay in filing suit is their asserted right to await the completion of the EEOC administrative process. The issue before us, therefore, is whether plaintiffs' failure to file a private action until after the termination of the EEOC's active, continuing administrative process is unreasonable.

The Supreme Court in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), discussed a similar issue. The employer-defendant in *Occidental Life* claimed that either federal or state statutes barred the EEOC from initiating suit more than three years after a claimant had filed a charge with the EEOC. In language particularly applicable to the present case, the Court indicated: "When Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities." *Id.*, 97

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578 F.2d 98, 101 (5 Cir. 1978); *Wheat v. Hall*, 535 F.2d 874, 876 (5 Cir. 1976). The determination is complicated by the fact that the question has arisen most often in admiralty cases, which may not be entirely controlling in the present case. We find it unnecessary to decide this issue, however, because the facts as presented on this summary judgment motion, without more, do not allow a finding of laches.

S.Ct. at 2455. A legislative analysis of the 1972 amendments to Title VII is similar:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's right to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

118 Cong. Rec. 7565 (1972).

[11, 12]) These statements clearly indicate that the private remedy allowed by 42 U.S.C. § 2000e-5(f)(1) is only an alternative method for a plaintiff to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forgo this alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC.[6] We therefore hold that plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches.

[13] Plaintiffs' § 1981 claim is in a slightly different posture. We have already decided that the state statute of limitations prevents plaintiffs from asserting claims arising more than two years before the filing of the com-

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6. As stated in *Sangster v. United Air Lines*, 438 F.Supp. 1221 (N.D. Cal. 1977):

> Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

plaint. Therefore, any delay occurring before that period is irrelevant to the § 1981 claim. Defendnts have not alleged that plaintiffs delayed inexcusably in asserting the claims arising within those two years. Therefore, it is unnecessary for us to consider whether laches could be invoked to bar those claims arising within the legal limitations period.

[14, 15] We also conclude that, on the evidence presented, any prejudice suffered by defendants was caused not by plaintiffs' delay but by defendants' own actions. In the only affidavit supporting this element of defendants' summary judgment motion, the personnel director of Gulf indicated that since the date when plaintiffs allege the violations began, defendant Gulf has made several personnel changes, a number of management personnel have retired, and two personnel managers have deceased. These statements are insufficient grounds on which to base a finding of prejudice, The fact that there have been personnel changes or that employees have retired is irrelevant unless those employees are unavailable. *Akers v. State Marine Lines, Inc.*, 344 F.2d 217, 221 (5 Cir. 1965).

[16, 17] The affidavit does not indicate that two former personnel managers have died and that those employees' knowledge is irreplaceable. Gulf asserts the live testimony of these employees is necessary, however, only because it has destroyed the written records of the personnel decisions made from 1965 through 1974. Defendants argue that they cannot now adequately defend against plaintiffs' charges without reference to these destroyed records. The EEOC informed defendants of the charges in 1967. Pursuant to its normal document reten-

tion plan, Gulf retained documents for only four years. Thus, Gulf did not destroy the documents relevant to the claims arising in 1965 until 1969, two years after Gulf learned of the charges. A party cannot assert the defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim. *Ameircan Marine Corp. v. Citizens Cas. Co.*, 447 F.2d 1328 (5 Cir. 1971).[7] This rule is of even greater validity in this case than in most. Since 1966, the EEOC has maitained a regulation prohibiting those charged with Title VII violations from destroying records relevant to the charge. 31 Fed. Reg. 2833 (Feb. 17, 1966) (currently at 29 C.F.R. 1602.14 (1977). Therefore, defendants' argument that plaintiffs' delay prejudiced defendants is without merit. Insofar as defendants have been prejudiced, the evidence before the court shows that defendants' own negligence

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7. The concluding statements of the Supreme Court in *Occidental Life* are again relevant:

> The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, 29 CFR § 1601.19b(b), and when the EEOC has terminated its efforts to conciliate a dispute, *id.*, §§ 1601.23, 1601.25.

97 S.Ct. at 2458.

and disregard of EEOC regulations caused the prejudice.[8] We conclude that the present facts do not allow findings of either unreasonable delay or prejudice. Therefore the doctrine of laches is inapplicable.

IV.

[18] Because we are remanding this case for further action it is necessary that we consider the propriety of an order the district judge entered restricting the parties' communication with the members of the putative class. Judge Steger, in Chief Judge Fisher's absence, originally entered an order generally prohibiting all communication without exception. Chief Judge Fisher later modified the order. It is of this later order that plaintiffs complain on appeal. The modified order was explicitly modeled on those suggested by the Federal Judicial Center in the Manual for Complex Litigation, Part 2, § 1.41 (1977).[9]

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8. Defendants admit that plaintiffs' § 1981 claims are nearly identical to their Title VII claims. Defendants could therefore disprove the claims with the same evidence. Since the EEOC regulations required defendants to maintain all records relevant to the Title VII claims, defendants could not have been prejudiced with respect to either Title VII or § 1981.

9. The order provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all adressees and with a motion and proposed order for prior approval by this Court of the proposed

Plaintiffs argue that the order was improper for several reasons. First, they assert that it is inconsistent with the

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communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public officc or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication, file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

policies of Rule 23 of the Federal Rules of Civil Procedure and therefore beyond the powers of the district court. We reject that argument and hold that the order was a permissible exercise of the trial court's discretionary power in controlling a class action.

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(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir. 1975), *cert. denied,* 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation,* Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

As one noted treatise states:

> Because class actions tend to be extremely complicated and protracted, their management and disposition frequently require the exercise of considerable judicial control and ingenuity in the framing of orders relating to various aspects of the case. Rule 23(d) provides the trial court with extensive discretion in achieving this objective and offers some guidance as to the types of problems the district judge is likely to encounter.

7A C. Wright & A. Miller, Federal Practice & Procedure § 1791 at 193 (1972).[10]

[19-21] We believe the trial judge could have easily concluded that his interest in and duty of controlling the suit in this manner outweighed any interest plaintiffs' attorneys may have in communicating with members of the putative class without the prior approval of the court. Rule 23 imposes on the trial judge the duty of assuring that a class action is an appropriate way to resolve the controversy, the representative parties will fairly and adequately protect the interests of the class, the pleading and trial of the case is conducted fairly and efficiently, and any settlement or compromise is not unfavorable to the class.[11] The present order could be helpful in exercising

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10. *See In Re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006, 1012 n. 8 (5 Cir. 1977): "In class actions we recognize, indeed insist upon, the court's participation as the manager of the case."

11. Thus, although in the ordinary non-class suit, restrictions such as those in the present case might be entered in the form of a temporary injunction and only after relatively strict scrutiny of specific criteria, the drafters of the Rules felt that the trial judge needed broader powers with respect to class actions and specially imbued the district court with more extensive authority to control the suit.

many of these duties, especially those of assuring fairness and efficiency. Any communication between the parties and class members may mislead the class members by appearing to reflect the opinion of the court rather than that of the party making the communication. This danger exists "simply because of references to the title of the court, the style of the action, the name of the judge, and to official processes." Manual for Complex Litigation, Part 1, § 1.41 at 27 (C. Wright & A. Miller ed. 1977). The trial court should therefore have the power to examine any communication in order to assure that class members will not be misled in this manner. Even apart from any references to the court, communications to potential class members by the parties may unfairly represent facts or issues relevant to the action. When those communications are sent during a limited period in which class members may opt out of the class, or, as here, in which they may accept a back pay offer pursuant to a conciliation agreement, any misleading statement may be irreparable. The trial judge may also believe that requiring prior approval of communications will reduce the risk of the class members becoming confused by an avalanche of notices, inquiries, and arguments directed to them by each of the parties to this action. Thus, there are many substantial reasons a trial judge may believe that an order such as that suggested in the Manual for Complex Litigation is justified.[12]

12. The Manual enumerates other potential abuses that may justify the use of such an order, for example: solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; and solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action. Arguably these concerns are not significant in this case in which the potential class is represented by a non-profit organization whose fees are not paid directly by the class members.

Plaintiffs assert their interests outweigh these concerns of the trial judge. Plaintiffs argue that to conduct the action adequately they must be allowed to contact class members in order both to discover their case and to inform class members of their civil rights. They allege that the order prevents them from performing those functions. This is not true; the order only prohibits contact with class members without prior approval of the court. Therefore, only plaintiffs' interest in *unrestrained* communications is to be balanced against the court's interests in requiring court approval of all communications sent to class members.

[22-24] Plaintiffs' ability to discover their case is in no way reduced by the requirement that the court approve any contact. It is expected that the trial judge will exercise "minimal judicial control of these communications . . ." and freely allow discovery. Manual for Complex Litigation, Part 1, § 1.41 at 29 (C. Wright & A. Miller ed. 1977). The trial judge should refuse to allow only those attempts at discovery that would clearly affect the fairness or efficiency of the litigation adversely. Plaintiffs have not shown that this "minimal control" would prejudice them in any way. Therefore, we do not believe plaintiffs have any significant interest in seeking discovery without the prior approval of the court. Similarly, to the extent that Rule 23 implicitly provides plaintiffs with a right to "encourag[e] common participation in the litigation of [plaintiffs' race] discrimination claim," *Coles v. Marsh,* 560 F.2d 186, 189 (3 Cir.), *cert. denied sub nom., Blue Cross v. Marsh,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), the same rule's explicit grant of authority to the trial court to control the conduct and settlement of the action outweighs plaintiffs' right.

Therefore, although there may be other methods of achieving similar results,[13] Rule 23 does not prohibit a trial court's discretionary use of an order requiring prior approval of communications with class members.[14]

[25] Plaintiffs next argue that the order is an unconstitutional prior restraint on their communication with the class and is especially egregious in this case in which plaintiffs are represented by an organization highly regarded as an effective opponent of discrimination. This argument is considered and rejected in the recent revision of the Manual for Complex Litigation, Part 1, § 1.41 at 1-3 (C. Wright & A. Miller ed. 1978 Cum. Supp.) and in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977). We find it unnecessary, however, to decide whether the interests discussed above would also justify the prior restraint of any constitutionally protected communication. The order in the present case, unlike those in *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3 Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975), *Waldo* or the Manual, explicitly

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13. *Compare* Developments in the Law-Class Actions, 89 Harv. L. Rev. 1281, 1601-04 (1976), *with Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782, 792 n. 10 (E.D. La. 1977).

14. Because the trial judge made no findings of fact concerning plaintiffs' attorneys' alleged improprieties, the allegations are irrelevant to our decision. We hold that the trial judge had the power to restrict communications without regard to any allegations of unethical conduct. This holding is necessary because many of the dangers of abuse and irreparable harm discussed above can arise without warning. Requiring the district court to find specific evidence of the dangers in a particular case before acting would severely hamper its ability to control the case. In many instances, the abuses must not merely be punished, but must be prevented. This can be accomplished only if the trial judge can order the restrictions before the abuses have materialized.

exempts communications that a party or counsel asserts are constitutionally protected from prior restraint.

[26] Despite this provision, plaintiffs argue that the order chills their free exercise of protected activities because they can never be certain that the district court will agree with their assertion that the communication is protected.[15] As an example of such a disagreement, plaintiffs rely on an incident in the trial court. Plaintiffs submitted a document to the court for approval asserting that it was constitutionally protected. The judge refused to allow plaintiffs to send the document to the class members. Plaintiffs argue that if they had sent the document without submitting it they may have been subject to a contempt order. This argument is without merit. The exemption applies when the parties make any communication they *assert* is protected, not merely when the trial judge agrees with that assertion. Thus, as long as a party or counsel makes any unapproved contact with class members in the good faith belief that the contact is constitutionally shielded, he may not be punished for violating the court's order. Once plaintiffs submitted the proposed communication to the district judge, however, the exemption for communications they asserted were constitutionally protected was no longer relevant. At that point the issue became whether the Constitution, in fact, protected the communication rather than whether the plaintiffs had distributed it in the good faith belief that it was constitutionally protected. Plaintiffs have not argued on appeal that the trial judge erred in deciding that he

15. *See* Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975): The "proviso exempting constitutionaliy-protected communication does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule."

could properly prohibit the distribution of that particular document nor have they alleged his determination was untimely. They have alluded to the incident only as an example of the alleged "chill" the order prohibiting unapproved communication placed on the exercise of their first amendment rights, notwithstanding the exception for communications they asserted to be constitutionally protected. Therefore, we need not decide whether the judge properly prohibited dissemination of this particular notice after plaintiffs submitted it for his approval. We note, however, that even though the prohibition on unapproved communications is permissible, the judge's separate decisions approving or disapproving particular communications would normally be proper subjects for appellate review.

[27] We conclude that the present order adequately safeguards the first amendment rights of the parties and counsel because even if the prohibitions of the order are vague or overbroad, the parties can avoid them if they assert a good faith belief that a particular communication is constitutionally protected. *Cf. Screws v. United States,* 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945): "the requirement of specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid."

[28] Plaintiffs' final contention is that the order violates their right to equal protection of the laws. This claim is based on the assertion that the order allows defendant to offer back pay settlements to the class members and to contact class members in the ordinary course of defendants' business without allowing plaintiffs similar

rights. This argument is invalid because it is based on an incorrect reading of the order. The order prohibits defendants as well as plaintiffs from contacting the class members regarding back pay settlements. Rather than allowing further contact by either party, it directs the court clerk to distribute a notice to class members informing them that they have 45 days within which to accept the back pay award to which they are entitled under the conciliation agreement negotiated by the EEOC and directs them not to accept the award if they wish to participate in any recovery secured by plaintiffs in this action. Further, the provision allowing communication with class members in the regular course of business applies equally to all parties and counsel, not merely to defendants. It could be argued that allowing contact in the regular course of business would tend to favor defendants in practice because of their greater day-to-day contact with the employees. Any management discussion of the merits of the suit with class members, however, would not be in the regular course of business. Therefore, although defendants may have greater day-to-day contact with the class members, the order does not allow defendants any greater freedom than plaintiffs in discussing the suit with class members.

We therefore conclude that the district court's order of June 22, 1976, is a permissible exercise of the court's power to control class action litigation and is prohibited by neither the first nor fifth amendments to the Constitution.

The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

GODBOLD, Circuit Judge, concurring in part, and dissenting in part:

I concur in Parts I through III of the majority opinion. I dissent from Part IV, which upholds the validity of the district court's order restricting communications by named parties and their counsel with any actual or potential class member not a formal party.

The issue is important. The critical part of the order in question follows the form suggested in the Manual for Complex Litigation, 1977 ed., Pt. 2, § 1.41.[1] This case presents in this circuit for the first time the validity of such an order. Another circuit has taken a position contrary to the majority's decision.[2]

In other cases I have vigorously asserted the power of the district court to manage class actions and other complex cases.[3] But, in my opinion, the restraints imposed in this case contravene Rule 23, F.R.Civ.P., and violate freedom of speech and freedom of association as guaranteed by our Constitution.

I. *The history*

Understanding the issues requires a more complete history than the brief statement made by the majority. In

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1. Sample Pretrial Order No. 15. The suggested form is a reprint of a pretrial order entered by the District Court for the Western District of Missouri. *Manual*, Pt. 2, § 1.41 n.33.

2. *Coles v. Marsh*, 560 F.2d 186 (CA 3), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). *See also Rodgers v. United States Steel Corp.*, 508 F.2d 152 (CA 3), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

3. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 & n.8 (CA 5, 1977); *Huff v. N. D. Cass Co.*, 485 F.2d 710, 712-13 (CA 5, 1973) (en banc).

April 1976 Gulf and EEOC entered into a conciliation agreement covering alleged racial discrimination by Gulf against black employees at its Port Arthur, Texas plant, pursuant to which Gulf agreed to cease alleged discriminatory practices, establish an affirmative action program, and offer back pay to alleged discriminatees, ranging, for various employees and various periods, between $2.81 per month of service and $5.62 per month of service. The affected employees were not parties to the agreement. Gulf agreed to notify affected employees of the back pay agreed upon; failure of the employee to respond would be regarded as acceptance. According to Gulf, back pay was offered to 614 present and former black employees of the Port Arthur plant.[4]

In May 1976, while implementation of the conciliation agreement was in progress, six present or retired black employees of the Port Arthur plant brought this class suit, under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, on behalf of black employees, black former employees of the plant, and black applicants rejected for employment with Gulf Oil Company (not limited to the Port Arthur plant). Plaintiffs were represented by Stella Morrison, of Port Arthur, Charles E. Cotton, of New Orleans, and three New York attorneys from the NAACP Legal Defense and Education Fund, Jack Greenberg, Barry L. Goldstein and Ulysses Gene Thibodeaux. Plaintiffs asked injunctive and declaratory relief and damages. The defendants are Gulf and the Oil, Chemical and Atomic Workers' Union. Plaintiffs charged that Gulf discriminated against blacks in hiring and job assignments, employed discriminatory tests, paid

4. And 29 female employees.

unequal pay, employed racially tainted promotion and progression practices, denied training to blacks, refused seniority to blacks, and discriminatorily discharged and disciplined blacks. They alleged that the union had agreed to, acquiesced in or condoned Gulf's discriminatory practices.

According to affidavits later filed by plaintiffs' counsel, a meeting of black employees who were members of the alleged class was held May 22 at the request of the named plaintiffs, plaintiffs' counsel were invited to attend, and some did attend. Gulf was served with process May 24. On May 27, before Gulf filed responsive pleadings, it filed a two-sentence, unsworn request that the court enter an order limiting communications by parties and their counsel with actual or potential class members. The motion was accompanied by an unsworn brief asserting that Ulysses Gene Thibodeaux, one of plaintiffs' attorneys, had recommended to actual and potential class members at a meeting that they not sign receipts and releases sent them pursuant to the conciliation agreement. Further, the brief said that it had been reported to Gulf that Thibodeaux advised the group that they should mail back to Gulf checks received pursuant to the conciliation agreement because he could recover twice as much for them by the pending suit. Gulf asserted in its brief that these actions violated standards imposed on attorneys by law and by the Canons of Ethics. It asserted that an order of the court was necessary to prevent further communication of the type alleged and that the statements by plaintiffs' attorney would prejudice its defense of the case and the conciliation efforts. In its brief Gulf said that when the summons was served on it approximately 452 of the 643 employees entitled to

back pay had received checks and executed general releases.

On May 28, after oral argument by the parties, District Judge Steger entered a temporary order effective until Chief Judge Fisher could return and assume control and administration of the case. His order is substantially the same as paragraph 2 of the modified order, which appears as note 9 of the majority opinion, that is, it contained the restraints without the exceptions. Judge Steger made no findings.

On June 8, Gulf filed an unverified motion to modify the temporary order to permit it to resume offering back pay awards and to receive receipts and releases, as provided by the conciliation agreement. Gulf added, again by an unsworn brief attached to its motion, a new allegation of misconduct by saying that it had been reported to Gulf that Thibodeaux had recommended to the persons at the meeting that even if an employee had signed a receipt and release he should return his check to Gulf. Gulf also filed an affidavit from EEOC stating that it felt the issues in this suit were "almost identical" to those embraced by the conciliation agreement.

Plaintiffs filed an unsworn responsive brief, squarely raising the constitutionality of the order and the district court's authority to issue it. Judge Fisher conducted a hearing on June 10 and allowed time for additional briefs. With their next brief plaintiffs filed affidavits by Thibodeaux, Morrison and Goldstein, covering several points. Thibodeaux denied that he advised potential class members not to accept Gulf's offer of settlement and denied that he stated that plaintiffs' counsel could get employees twice as much back pay by suit. According to the

affidavits, none of the lawyers accepted or expected compensation from the named plaintiffs or any additional named plaintiffs or from members of the class; the only anticipated compensation was by attorneys' fees awarded by the court against the defendants, and in the case of the LDF attorneys any fees awarded them would be paid over to LDF. The affidavits also set out that it was necessary for plaintiffs and their counsel to communicate with members of the proposed class to investigate systematic and individual racial discrimination, complete discovery, and define issues in the case, and that, because of the back pay offers made by Gulf under the conciliation agreement, it was of crucial importance that plaintiffs' attorneys be able to inform class members of their rights and answer their questions and concerns. In their brief, plaintiffs asserted that many of the issues (specifying several of them) encompassed by the suit were not included within the matters covered by the conciliation agreement.

On June 22, without requiring Gulf to verify its charges of improper and unethical conduct by Thibodeaux, and without making findings of fact, Judge Fisher entered the modified order. He rejected plaintiffs' contention that the order was constitutionally invalid.

I turn to the contents of the modified order. Its opening language is plenary in form. I discuss below the exceptions that appear further on in the order.

The persons enjoined are "all parties hereto and their counsel."[5]

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5. The majority refer several times to the order's restricting communication *by the parties*. Elsewhere they refer to the interests of *plaintiffs' attorneys* in communicating with putative class members. The order bars both named parties and counsel.

The subject matter forbidden is communications "concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this court." More specific communications which the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The persons with whom communication is forbidden are potential and actual class members.

The second subparagraph of ¶ (2) sets out exceptions as provided in the *Manual's* suggested form: communications between attorney and client, and attorney and prospective client when initiated by the prospective client, and communications in the regular course of business. The third subparagraph of ¶ (2) is the "constitutional right" exception:

> If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in

writing, or an accurate and substantially complete summary of the communication if oral.

In the modified order Judge Fisher added to the *Manual's* proposed form a provision that the clerk mail a notice to employees covered by the conciliation agreement stating that they had 45 days in which to accept Gulf's offer and that all who delivered receipts and releases within 55 days would be deemed to have accepted. See ¶ (4) and ¶ (9) of the order. In ¶ (8) the court restated the restraints on communication that it had imposed in the earlier part of the order.

On July 6, pursuant to the "constitutional right" exception, plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class. They attached the following notice which they proposed to distribute and asserted that they were constitutionally entitled to distribute it:

Illustration to follow.

ATTENTION
BLACK WORKERS
OF GULF OIL

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN*. These lawyers will talk to you *FOR FREE*:

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beamount Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

Plaintiffs alleged in their motion that neither Gulf's offer to employees nor the notice sent by the clerk explained the terms of the conciliation agreement. They asked the court to declare that the notice was constitutionally protected. They noted that under the "constitutional right" exception to the order they were entitled to distribute the notice and file it with the court within five days thereafter. However, because of what they considered to be the vagueness of the order, and "for reasons of prudence," the plaintiffs asked for the court's guidance. The reasons for asking guidance were not unreasonable. The first subparagraph of ¶ (2) of the order required that *any* proposed communication be presented in writing for prior approval. Paragraph (3) restated all the restraints. The "constitutional right" exception appeared to permit retrospective filing in place of prior court approval. But counsel already charged with unethical and illegal conduct cannot be faulted for electing not to gamble on their interpretation of the order or upon the possibility that if they sent the notice without preclearance the Court might find it not constitutionally protected and

their assertion of constitutional protection not made in good faith.[6] As it turned out, their prudence was justified because the court ultimately denied permission to send the notice.

The request for guidance from the court, filed July 6, was appropriate and respectful, and it deserved timely court action. To be effective the notice that plaintiffs proposed to send needed to be distributed promptly. The 45 days for acceptance of Gulf's offer, described in the Clerk's notice, expired on or about August 8. The court did not act on plaintiffs' motion until August 10, when it denied the motion by a one-sentence order without explanation.

II. Misuse of discretion

I believe that the court misused its discretion in entering the orders in this case.[7]

(1.) Non-compliance with Rule 23(d)

Rule 23(d) gives the following authority to the court:

> In the conduct of actions to which this rule applies, the court may make *appropriate* orders: . . . (3) imposing conditions on the representative parties. (Emphasis added.)

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6. *See Rodgers v. United States Steel*, 508 F.2d 152, 161 (CA 3), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975): "The attorneys for the plaintiffs, with appropriate caution, declined to test an ambiguous order by violating it and risking contempt."

7. The district court had not adopted a local rule concerning limiting communications in class actions. We are, therefore, not concerned with rule-making power but with the authority of the court, inherent or conferred by Congress through the Rules, to impose the limit on communications. The *Manual*, Pt. 2, § 1.41, contains a suggested local rule, an earlier version of which was held invalid in *Rodgers v. United States Steel, supra.*

This provision, added in 1966, gives the trial court "extensive power" to control the conduct of a class action. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 (1972). There will be situations in which it will be "appropriate" for the court to restrict communications between counsel and potential class members. But, however, broad "appropriate" may be it is certainly no broader than the limits imposed by the Constitution, as discussed in Part III, below. Pretermitting constitutional limits, it seems to me that the district court must find that restrictions are "appropriate" upon a factual showing by the moving party that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened.[8] In this case, "appropriateness" was not proved and no finding of "appropriateness" was made by either district judge.

The only arguable grounds I perceive for the order's being "appropriate" are the unsworn statements by Gulf that were denied by plaintiffs' attorney under oath, the discussions in the *Manual* of possible abuses of class actions, and the existence of the conciliation agreement in the process of implementation.

With respect to the presence of plaintiffs' counsel at the meeting of employees, it seems to me singularly inappropriate for the district court to rely—if it did rely—

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8. The Third Circuit in *Coles v. Marsh*, 560 F.2d 186, 189 (CA 3), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), discussed the validity of a similar order restraining communications in terms of the district court's power and held it invalid. Although I reach the same result as the *Coles* court, I think it is preferable to analyze the question in terms of the district court's discretion.

upon Gulf's representations that Thibodeaux made statements which violated both the law and the Canons of Ethics. Gulf never presented proof of this hearsay. Under oath, Thibodeaux denied making such statements.[9]

Nor should a judicial decision on "appropriateness" be rested upon the discussions in the *Manual.* With deference to the opinions of the distinguished Board of Editors concerning the possibility of abuses in class actions, a trial court should not merely presume that in the case before it—indeed in all class actions coming before it—abuses are either present or threatened.[10]

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9. In this appeal Gulf restates the hearsay as though it were fact proved and found. Also it throws in this alternative argument:

> By affidavit, one of the Appellants' attorneys admits to attending the discussions, but denies making any improper statements. Whether the statements, in fact, are true is immaterial since the admitted appearance by Appellants' attorneys at such a meeting provides the potential for abuse of the class action process which the Manual and Rule 23 seeks to prevent.

Br. p. 42. Counsel for Gulf treat more lightly charging an attorney with unethical and improper conduct than I would be willing to do.

10. The *Manual* cites *Weight Watchers of Philadelphia v. Weight Watchers International, Inc.*, 455 F.2d 770 (CA 2, 1972), as confirming an "almost unreviewable discretion" in trial courts to regulate communications between counsel and active and potential class members. *Weight Watchers* rests upon the unreviewability of discretionary orders by mandamus. The issue is before us by appeal. In *Rodgers,* the Third Circuit said:

> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney,* [331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947)] and *Bridges v. California,* [314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941)] would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, [Federal Practicce ¶ 1.41, at 29 n. 28, (2d ed. 1974, Part 2)].

508 F.2d at 165. *Rodgers* granted mandamus against use of a local rule then appearing in the *Manual* and since amended. I discuss in Part III, below, the consittutional limitations imposed by *Craig v. Harney* and *Bridges v. California.*

The order in this case was entered pursuant to the authority given the district court under Rule 23(d). That rule requires the district judge to exercise his discretion in making orders. He is only authorized to make "appropriate orders," and a determination of what is appropriate requires the exercise of discretion. What is appropriate for one case is inappropriate in another. If communications between counsel and actual and potential members of a class action were always abusive of the class action device then it would be appropriate to automatically enter an order restricting communications. Such communications, however, in many instances serve to effectuate the "purposes of Rule 23 by encouraging common participation in [a lawsuit]." *Coles v. Marsh, supra* at 189. The decision whether to restrict communications in a particular case, therefore, requires an inquiry into the likelihood of abuse and the potential for benefits. The *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case. The rule requires no less.[11]

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11. In *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977), the district court rejected the claim that it exceeded its rule-making authority under Rule 83 by adopting its Local Rule 2.12(e), identical to the *Manual's* suggested Rule. The court concluded that "[t]he potential abuses attendant upon . . . unregulated communication clearly undermine the efficacy of the class action device." *Id.* at 794. The local rule was, therefore, consistent with the Federal Rules of Civil Procedure, the standard for judging the validity of a local rule. The difficulty with the district court's analysis is that Rule 2.12(e) applies to every case. It does not permit the district judge in an individual case the discretion to not restrict communications, although in some cases it would be inconsistent with the policies of the Federal Rules to restrict communication. A refined approach that does not sweep so broadly that it does away with the benefits of attorney-client contact and recognizes the interests that putative class members have in receiving

Here, at the appellate level, the majority grounds its decision on possibilities rather than actualities. It refers to what the parties "may do," to what the trial judge "could have easily concluded," how the order "could be helpful" to the judge in exercising his Rule 23 duties, to what the judge "may believe" and of how communications "may mislead." This is not the stuff of which judicial decisions are made.

The final potential justification for the court's order is the strong emphasis upon settlement of Title VII disputes by conciliation rather than in the courtroom. *U. S. v. Allegheny-Ludlum, Industries, Inc.*, 517 F.2d 826, 846 (CA 5, 1975). But, as we noted in *Allegheny-Ludlum*,

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]der some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 & n.26 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720,

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communications is called for. The need for such an approach was recognized by District Judge Bue in his report accompanying the Southern District of Texas' amendments to its local rule restricting communications, discussed *infra*. Judge Bue's discussion focuses primarily on constitutional problems with the *Manual's* rule. A similar need for a narrow rule that successfully guards against abuses while not doing away with the benefits of communication is also required so that it does not run afoul of Rule 83's mandate that district courts adopt only local rules that are consistent with the policies of the Federal Rules.

44 L.Ed.2d 295, 302 (1975)). In *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (CA 5, 1974), *vacated on other grounds,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it freight his choice with restrictions that were not "appropriate" under the circumstances. Gulf had represented to the court that the conciliation agreement was fair and embraced substantially the same issues as the suit. But plaintiffs' counsel had represented that the conciliation agreement was seriously deficient; that on its face it neither made the black employees whole nor satisfied the dictates of Title VII; that the relief supplied was inadequate because the goals were statistically improper, there was no firm commitment to timetables, and there was no relief from illegal testing. Plaintiffs had set out other objections as well. According to plaintiffs, the notices sent out by Gulf did not even explain how back pay was computed.

The conclusion is inescapable that the court's limitation on communications was intended to further employees' accepting conciliation awards in preference to

participating in the suit.[12] Predetermining whether a court can ever appropriately do this, in this instance it could not, in deciding "appropriateness," elect to favor conciliation and frustrate or chill the right of black employees to choose the litigation route by cutting them off from talking with the named plaintiffs and with the only attorneys who had direct expertise about the suit.

The majority has failed to take into consideration the benefits flowing from communication between the parties and the potential class members. In racial discrimination cases group solidarity may be vital to trigger and to sustain the willingness to resort to legal remedies for the removal of discrimination, but the court order bars black plaintiffs from all communication with fellow blacks employed by Gulf concerning this case. The majority also does not give weight to the need and desire of potential class members for advice of counsel concerning back pay versus lawsuit. The order permits a potential class member to confer with attorneys for plaintiffs at the prospective class member's request. Pragmatically this is a dubious exception. A prospective class member must find out who the attorneys are and when and where to see them, but the actual class members are forbidden to give him this information—or any other information about the case—without prior court approval, nor can counsel furnish this information to potential class members generally.

The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this

12. If not otherwise clear, the court's approach was made clear by its direct entry into the conciliation effort (discussed below), and its withholding action on plaintiffs' request for permission to send the proposed notice until after the time had expired for accepting back pay awards.

question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

The limitations I suggest do not diminish the significance of the potential problems seen by the draftsmen of the *Manual* and by the majority here. I would simply require a showing that the problems are real and not imaginary.

To the extent the majority bases its approval of the lower court's orders on the premise that it is always appropriate to restrict communications in class actions, that premise is peculiarly unfounded in this case. The counsel silenced without factual showing include those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button,* 371 U.S. 415 at 422, 83 S.Ct. 328 at 332, 9 L.Ed.2d 405 at 411-12 (1963), and engaged in "a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 539 n.4 (CA 5, 1970).

(2.) Court involvement in conciliation

Apart from the order's limit on communications, it inappropriately involved the court in the extra-judicial

conciliation effort. Gulf had mailed out back pay offers before suit was filed. In its motion to modify Judge Steger's order, Gulf asked the court to direct the clerk to send notices to all employees who had not accepted its offer and signed releases. Gulf's theory was that the court could do this under its power to supervise a settlement. The court granted the motion and extended the time for acceptance to 55 days from the date of the clerk's notice. The back pay offers were not offers to settle a lawsuit. The nudge given to black employees who had not accepted Gulf's offer, given under the official imprimatur of the court, was not permissible.

I would hold that the order was improvidently entered under the terms of Rule 23(d). Perhaps Rule 23(d) merely restates an implied power of the court. If that is so, exercise of the power is limited by the same restraints on the court's discretion that I have already discussed. I turn then to constitutional limitations.

III. The constitutional issues

The general rule is that otherwise protected utterances concerning the courts may be punished by contempt only if they pose "an imminent, not merely a likely threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546, 1552 (1947). The likelihood must be great that a serious evil will result, and the evil itself must be substantial. *Bridges v. California*, 314 U.S. 252, 260-63, 62 S.Ct. 190, 192-94, 86 L.Ed. 192, 202-03 (1941). Significantly, it is these two cases to which the *Manual* turns in addressing constitutional limitations. Pt. 2, § 141, n.33. Nor does the constitutional rule change when applied to lawyers,

even when they participate in the judicial process. *In re Halkin,* —U.S.App.D.C.—, 598 F.2d 176, 47 Cr.L. Rep. 2413 (1979). A lawyer's First Amendment rights to comment about pending or imminent litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 249 (CA 7, 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (quoting *In re Oliver,* 452 F.2d 111 (CA 7, 1971); *accord, Chase v. Robson,* 435 F.2d 1059, 1061 (CA 7, 1970); *cf. U.S. v. Tijerina,* 412 F.2d 661, 666 (CA 10), *cert. denied,* 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969) (reasonable likelihood that comments by criminal defendants will prevent a fair trial justifies court order prohibiting extrajudicial comments).

In this case the subject matter of the restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients, discussed below. The attorneys may not counsel a black employee free of any effort to solicit him. The Third Circuit, in *Rodgers,* in holding invalid a local rule that contained a similar prohibition on communications between counsel and potential class members[13] did not reach the constitutional issue but noted the problem:

The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n*

13. The local rule in issue in *Rodgers* did not include the "constitutional right" exception which has been added to the suggested form in the *Manual.* I discuss below that this does not remove the constitutional issue.

v. United States, 491 F.2d 219 (3d Cir.), cert. granted, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).

508 F.2d at 162-63.

Next I turn from the general restraint on the attorney to the specific restriction against solicitation in subparagraph (a) of ¶ 2 of the order: "[S]olicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action." *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and its progeny, *In re Primus,* 436

U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagraph (a) is unconstitutional. In *Button*, the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[14] The solicitation was treated as a mode of political expression effectuated through group activity falling within the sphere of associational rights guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At these meetings forms were circulated which authorized LDF attorneys "to represent the signers in legal proceedings to achieve desegration." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*.[15]

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14. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

15. The notice that plaintiffs asked leave to send does not explicitly solicit persons to engage plaintiffs' attorneys or to join in the class but urges employees to seek legal advice and to become informed. It tells employees that plaintiffs' attorneys will talk to them without charge, suggests as an alternative talking to some other attorney, and emphasizes that the class action will proceed. No one is expressly urged to join the class, reject a release, or return a check.

Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of LDF lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the LDF lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case.

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra*. There the Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation, 436 U.S. at 419, 98 S.Ct. at 1899, 56 L.Ed.2d at 427. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of the litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the case, the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's

punishment of Primus for solicitation violated her First Amendment rights.[16]

Because the activity prohibited by subparagraph (a) of the district court's order is constitutionally protected activity it is necessary to consider whether there is a compelling government interest that justifies the prohibition and whether the means used are sufficiently specific " 'to avoid unnecessary abridgment of associational freedoms.' " *Id.* at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 434-35 (quoting *Buckley v. Valeo,* 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659, 691 (1976)). The *Primus* Court recognized that "the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, [and] lay interference," 436 U.S. at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 435, are evils the state may guard against and that these problems sometimes result from lawyer solicitation of clients. The Court went on to state, however, that prophylactic rules intended to guard against such evils are not permissible when aimed against constitutionally protected forms of solicitation because of their impact on First Amendment rights. *Id.* When dealing with *Button*-type solicitation, as opposed to commercial forms of solicitation, *see Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S.Ct. 1912, 56

16. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus,* sustained, against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication of illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida,* 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 393 A.2d 1175 (Penn. 1978).

L.Ed.2d 444 (1978), discussed in note 16, *supra*, there must be a showing that the solicitation "in fact involved the type of misconduct" 56 L.Ed.2d at 436, that may be constitutionally guarded against. A showing of potential danger does not suffice.[17] The lower court made no findings whether the substantive evils the court was constitutionally entitled to guard against had occurred. Without such findings subparagraph (a) of the order cannot stand.[18]

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17. As stated by the *Primus* Court

> Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, [1423,] 55 L.Ed.2d 707 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S., at 581, 91 S.Ct. 1076 [, at 1080] 28 L.Ed.2d 339; *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, [1795,] 10 L.Ed.2d 965 (1963); *Button*, 371 U.S. at 442-443, 83 S.Ct. 328 [, at 342-343], 9 L.Ed.2d 405; *Wood v. Georgia*, 370 U.S. 375, 388, 82 S.Ct. 1364, [1371,] 8 L.Ed.2d 569 (1962); *Thomas v. Collins*, 323 U.S. 516, 530, 536, 65 S.Ct. 315 [322, 325,] 89 L.Ed. 430 (1945).

436 U.S. at 434 n. 27, 98 S.Ct. at 1906 n. 27, 56 L.Ed.2d at 436 n. 27.

18. Subparagraph (b) of ¶ 2 of the order forbids solicitation of fees and expenses despite the affidavit setting out that the NAACP provides its services free of charge. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, I think it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar of Michigan, supra*, the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. I would, therefore, give such activity constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation presents some of the

Subparagraph (d) of ¶ 2 is applicable to this case and is in my view facially unconstitutional. It is narrower than the plenary proscription in the first sentence of the order, which prohibits all communications concerning the suit. Subparagraph (d) prohibits what might be called "objectionable communications." It prohibits all communications "which *may tend* to misrepresent [the class action] . . . and . . . which *may create* impressions tending, without cause to reflect adversely on any party, nay counsel, this Court or the administration of justice." (Emphasis added.) The order is overbroad because it is not limited to the clear and present danger test. "May tend to misrepresent," and "may create impressions" are not enough to justify suppression of protected speech. *See Chicago Council of Lawyers v. Bauer, supra* at 249. Also, while speech that poses an imminent threat to the fair administration of justice may be properly prohibited, speech that reflects adversely on any party or counsel may not. The only interests to which the First Amendment may be subordinated are compelling government interests. The government has no compelling interest in assuring that nothing unflattering will be said about Gulf or its attorneys.

It seems to me unnecessary to dwell at length on the vagueness of the order, particularly subparagraph (d).

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dangers recognized in *Primus* and *Ohralik* that a state or court may properly guard against. If the funds are to be used to defray litigation expenses, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672, 673 (S.D. Ohio, 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Penn., 1974), *modified*, 69 F.R.D. 117 (1975).

Subparagraph (c) of ¶ 2, relating to solicitation of "opt out" requests, seems to me to have no application to this case. It applies only to Rule 23(b)(3) class actions, and this action was brought pursuant to 23(b)(2).

In advising a potential class member of the relative merits of class action versus back pay offered under the conciliation award, counsel will almost inevitably say something that will be construed to reflect upon Gulf's offer—indeed that is at the heart of this whole matter of lawsuit versus settlement. If counsel goes to an employees' meeting at all,[19] the only safe advice to him is to remain mute.

In a thoughtful analysis of the constitutional issues involved in this case, District Judge Boyle, in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D.La., 1977), rejected a constitutional attack on his district's Local Rule 2.12(e) which is identical to the *Manual's* suggested rule. The court recognized that its rule

> restricts not only certain expressions by parties and counsel, but also impinges upon the constitutionally-derived interest of the recipient(s) to secure the communication. . . . Likewise limited by the rule's operation is the opportunity of the plaintiff organization to communicate concerning legal redress with those members who are not formal parties to the suit, which activity ordinarily would be entailed in the freedom of association and the collective right of an organizational membership to achieve effective judicial access.

Id. at 787 (citations and footnote omitted). The court then went on to catalogue the interests served by the Local Rule: (1) prohibition of solicitation of representation or funds protects laymen from unscrupulous attorneys and helps preserve the legal profession's image; (2) preservation of the court's obligation "to direct the 'best notice practicable' to class members, advising them of their

19. Assuming merely being there is not "indirect communication" as Gulf would seem to contend, *see* n.9, *supra*.

privilege to exclude themselves from the class," *id.* at 790, pursuant to Rule 23(c)(2) for class actions brought under Rule 23(b)(3); and (3) the administration of justice by preventing misrepresentations. *Id.* at 790-91. The court found these objectives sufficiently important to override the inhibitions on First Amendment rights and that the rule is the least drastic alternative.

I have several problems with the district court's analysis. First, the three categories of interests served by the rule can be tied to the specific prohibitions. The court does not explain how the plenary prohibition against all communications absent prior approval serves the specified goals other than to note that "the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any . . . attempt at prohibition by itemization." *Id.* at 791-92. I think the plenary prohibition in the first sentence of ¶ 2 of the order is facially overbroad. Communications that do not threaten any of the interests enumerated by the court are prohibited. When dealing with First Amendment rights, greater specificity is required.

District Judge Bue of the Southern District of Texas reached the same conclusion as I reach in his analysis of the amendments his district adopted to the *Manual's* suggested rule. The Southern District's rule contains only the specific prohibitions, dropping the across-the-board restraints. The primary reason for the change was to avoid a violation of the First Amendment by overbreadth: "The key to a constitutional rule which regulates class communication is to narrow down those instances in which a prior restraint is imposed to those in which the types of communications subject to judicial review before dissemination are clearly defined and clearly capable of

Rule 23 abuse." Bue, *Analysis of Proposed Revision of Local Rule 6 of the United States District Court for the Southern District of Texas,* (quoted in *Bulletin, Manual for Complex Litigation,* Federal Judicial Center, 9-10 (Aug. 25, 1978)).

Also, *Waldo* fails to distinguish between commercial forms of solicitation and *Button*-type solicitation. The significance of this distinction has already been discussed. Because the rule does not make this distinction, its prohibition on solicitation is overbroad. The government interests that may legitimately be protected by prohiting commercial solicitation do not usually need to be protected when *Button*-type solicitation is involved because it does not pose the same dangers as commercial soliciation. Moreover, the constitutional scrutiny given to a ban on commercial solicitation or punishment for engaging in such solicitation is significantly lower than the scrutiny given prohibitions on *Button*-type solicitation. Commercial solicitation is protected only by the commercial speech doctrine, which requires a lower level of scrutiny than required when there is an infringement of the constitutional rights of association and political expression which occurs when *Button*-type solicitation is prohibited. *Compare In re Primus, supra, with Ohralik v. Ohio State Bar Association, supra.*

The *Waldo* court's concern with protecting the administration of justice from misrepresentations of cases pending before it is legitimate. But the "reasonable likelihood" standard incorporated in the rule simply fails to comply with constitutional standards.

The proviso permitting post-distribution filing of a notice thought to be constitutionally protected is not a

cure. "This provision does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the [*Manual's*] proposed rule." Comment, 88 Harv.L.Rev. 1911, 1922 n. 74 (1975). The majority's conclusion that the assertion of a good faith belief gives total protection is disingenuous. The district court would still be entitled to inquire into the bona fides of counsel's belief.[20] Because counsel may be called upon to establish the basis for his good faith belief, and therefore is put at risk for possibly violating the court's order, the good faith exception does not ameliorate the chilling effect of the order. It is little comfort for a conscientious attorney to be told that he may communicate with potential class members but that at a later time may be called upon by the court to justify the communication.[21] Even if facially

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20. Although *Screws v. U. S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), probably requires a showing of specific intent to violate the court's order, that is certainly not the total protection from punishment envisioned by the majority; indeed, it indicates that assertion of good faith is not total protection.

21. The majority argues that "[o]nce plaintiffs submitted the proposed communication to the district judge . . . the exemption for communications they asserted were constitutionally protected was no longer relevant." The issue before the district court on a motion for permission to distribute would be whether the proposed communication is constitutionally protected, but the issue on this appeal is the constitutionality vel non of the order. In our examination of this issue, the constitutional exception provision is certainly relevant; indeed the unwillingness of the attorneys to rely on the exception in distributing the leaflet demonstrates the order's chilling effect. It is the proof of the pudding. Having lost on their motion to have the order restraining their communications declared unconstitutional, the reasonable—and respectful—course for them to follow was to ask the court's guidance before distributing the leaflet rather than take their chances under the constitutional exception. I assume that the majority does not mean that had the plaintiffs specifically renewed their constitutional objection to the order at the time they requested permission to distribute the leaftlet the chilling effect of the order could not have been considered by the district court. Such a position

a cure, the constitutional exception is no cure as applied to these plaintiffs who prudently asked for pre-distribution approval of the leaflet reproduced above rather than risk post-distribution filing and were given a belated denial.

IV. Conclusion

The district court misused its discretion under Rule 23(d) and violated the constitutional rights of plaintiffs' counsel, named plaintiffs and all other actual or potential members of the class by entering the orders. I dissent from Part IV of the majority opinion and would vacate the district court's order as modified.

JAMES C. HILL, Circuit Judge, specially concurring:

Being bound by the prior decisions of this Court, as I ought to be, I concur. *Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187, 1190 n. 10 (5th Cir. 1978).

My observations concerning the path upon which we embarked in *Zambuto v. American Telephone and Telegraph Co.,* 544 F.2d 1333 (5th Cir. 1977) are set out in my dissent to the opinion for the En Banc Court in *White v. Dallas Independent School District,* 581 F.2d 556, 563 (5th Cir. 1978) (Hill, J., concurring in part and dissenting in part).

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would be untenable. It is not necessary to disobey a court order to be able to make a chilling effect attack on it. Indeed, the exact opposite is normally required. A party may not violate a court order and then in a contempt proceeding for violating the order challenge its constitutionality. *Walker v. City of Birmingham,* 388 U.S. 307, 316-17, 87 S.Ct. 1824, 1830, 18 L.Ed.2d 1210, 1217 (1967).

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al.,
Defendants-Appellees.

No. 77-1502

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Sept. 27, 1979.

Appeal from United States District Court, Eastern District of Texas; Joe J. Fisher, District Judge.

Ulysses Gene Thibodeaux, Lake Charles, La., Barry L. Goldstein, Washington, D. C., Jack Greenberg, Patrick O. Patterson, New York City, for plaintiffs-appellants.

William H. Ng, Joseph T. Eddins, Assoc. Gen. Counsel, Charles L. Reischel, Asst. Gen. Counsel, Equal Employment Opportunity Commission, Washington, D. C., amicus curiae, for E.E.O.C.

Joseph H. Sperry, Wm. G. Duck, Kathleen M. Civins, Susan R. Sewell, U. S. Jones, Houston, Tex., for Gulf Oil.

Carl A. Parker, Port Arthur, Tex., for Oil, Chemical & Atomic Workers, Etc.

Michael D. Murphy, Port Arthur, Tex., for appellees.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC.

(Opinion June 15, 1979, 5 Cir., 1979, 596 F.2d 1249).

Before BROWN, Chief Judge, COLEMAN, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, JOHNSON, GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON and RANDALL, Circuit Judges.*

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

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* Judges Goldberg and Ainsworth have recused themselves and did not particpate in this decision.

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al.,
Defendants-Appellees.

No. 77-1502

UNITED STATES COURT OF APPEALS
Fifth Circuit.

June 19, 1980.

Employment discrimination suit was brought against employer and unions based on allegation that the employer and the unions had discriminated against plaintiffs and similarly situated black employees in violation of federal law. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, entered an order prohibiting the parties and their counsel from communicating with potential class members without court approval and later granted defendants' motions for summary judgment. Plaintiffs appealed, and the Court of Appeals, 596 F.2d 1249, reversed and remanded. Thereafter, the Court of Appeals, 604 F.2d 449, granted a rehearing en banc. The Court of Appeals, en banc, Godbold, Circuit Judge, adopted Parts I, II and III of the panel opinion and held that: (1) the district court's order which broadly restricted communication by parties and their counsel with actual and potential class members was an unconstitutional prior restraint of speech; (2) the order would be unconstitutional even if it were tested

under the more relaxed standards applicable to subsequent restraints on speech; and (3) the order was not an "appropriate order" within the meaning of the class action rule.

Order of district court vacated and judgment of district court reversed and remanded.

Tjoflat, Circuit Judge, concurred in the result and filed opinion in which Brown, Gee, Henderson and Reavley, Circuit Judges, joined.

Fay, Circuit Judge, filed specially concurring statement in which Coleman, Chief Judge, and Roney, Circuit Judge joined.

James C. Hill, Circuit Judge, dissented and filed opinion.

* * *

Ulysses Gene Thibodeaux, Lake Charles, La., Barry L. Goldstein, Washington, D. C., Jack Greenberg, Patrick O. Patterson, New York City, for plaintiffs-appellants.

William H. Ng, Atty., Joseph T. Eddins, Jr., Assoc. Gen. Counsel, Charles L. Reischel, Asst. Gen. Counsel, Susan B. Reilly, Lutz A. Prager, Equal Employment Opportunity Commission, Washington, D. C., Carol E. Heckman, Jessica Dunsay Silver, Drew S. Days, III, Asst. Atty. Gen., Appellate Sec., Civil Rights Div., Dept. of Justice, Washington, D. C., amicus curiae, for E.E.O.C.

Wm. G. Duck, Susan R. Sewell, U. S. Jones, Houston, Tex., for Gulf Oil.

Michael D. Murphy, Port Arthur, Tex., for Oil, Chemical & Atomic Workers, Etc.

John D. Buchanan, Jr., Tallahassee, Fla., William F. Kaspers, Atlanta, Ga., for amicus Tallahassee Memorial Hospital.

Appeal from the United States District Court for the Eastern District of Texas.

Before COLEMAN, Chief Judge, BROWN, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

GODBOLD, Circuit Judge:

This suit was brought as a class action by six present or retired black employees of the Port Arthur, Texas, plant of Gulf Oil Company, under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2) and 42 U.S.C. § 1981. The members of the asserted class are black employees and black former employees of the Port Arthur plant, and black applicants rejected for employment with Gulf Oil (at the Port Arthur plant and elsewhere). The defendants are Gulf Oil and the Oil, Chemical and Atomic Workers' Union.

Plaintiffs charged that Gulf discriminated against blacks in hiring, job assignments, pay scales, discipline and discharge, employed discriminatory tests and racially tainted promotion and progression practices, and denied

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* Judges Goldberg, Ainsworth and Charles Clark did not participate in the consideration or decision of this case.

training to blacks and refused seniority to blacks. They alleged that the union had agreed to, acquiesced in or condoned Gulf's discriminatory practices. The district court dismissed the Title VII claim as untimely filed, granted summary judgment for defendants on the § 1981 claim, and applied laches as an additional ground for its disposition of both claims. With respect to these three holdings, we adopt parts I, II, and III of the panel opinion[1] and reverse and remand to the district court. A fourth issue we will consider at length. It concerns the validity of an order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members not formal parties to the suit. By a divided vote the panel found the order valid. 596 F.2d at 1258. We hold that the order violated the First Amendment to the Constitution and Rule 23, Fed.R.Civ.P.

I. *The background*

The facts are accurately stated in the dissenting opinion to the panel decision, 596 F.2d at 1262-76, and the court adopts that statement. We restate the facts in condensed form.

In April 1976, Gulf and EEOC entered into an extrajudicial conciliation agreement covering alleged racial discrimination against blacks at the Port Arthur plant and providing for conciliation of alleged discriminatory practices and for back pay to 614 present and former black employees. No employees were parties to the agreement.

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1. *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, *vacated*, 604 F.2d 449 (5th Cir. 1979).

Plaintiffs brought this suit in May, 1976, represented by local counsel in association with New York attorneys from the NAACP Legal Defense and Education Fund. Before answering and before a class was certified, Gulf filed an unsworn request that the court enter an order limiting communication by parties and their counsel with actual or potential class members. Gulf asserted that it had received reports that one of plaintiffs' attorneys had attended a meeting of actual and potential class members and had advised the group not to sign receipts and releases sent to them pursuant to the conciliation agreement because he could recover twice as much for them in the suit just filed.

District Judge Steger entered a temporary order on May 28.[2] Gulf filed an additional unsworn charge that the same plaintiffs' attorney had also recommended that employees who had already signed receipts and releases should return their checks. Gulf also filed an affidavit from EEOC which stated that the issues in the suit were almost identical to those embraced in the conciliation agreement.

Plaintiffs challenged the constitutionality of the temporary order. They filed affidavits denying Gulf's charges and a brief asserting that numerous issues in the suit were not within the matters conciliated. On June 22, without proof of the unsworn charges made by Gulf and without entering findings of fact, Chief District Judge Fisher rejected plaintiffs' constitutional arguments and entered a modified order explicitly modeled on that suggested in the *Manual for Complex Litigation*, Part II, § 1.41 (1973

2. It is substantially the same as ¶ 2 of the modified order. *See* n. 4 *infra*.

ed.),[3] a publication widely used by federal judges. It is the validity of this modified order that is now before us.

On July 6 plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class and also asked for guidance from the court. They attached a notice, reproduced at 596 F.2d 1266, which they proposed to distribute and asserted that they were constitutionally entitled to distribute. The notice alerted black employees to the existence of the lawsuit as an alternative to acceptance of Gulf's conciliation offer and urged them to talk to an attorney. The time for acceptance of Gulf's conciliation offer expired on or about August 8. On August 10, the court, without explanation, denied plaintiffs' motion by a one-sentence order.

II. *The provisions of the order*

The order, described by plaintiffs as a "gag order," is broad in scope and plenary in nature, forbidding a wide range of communications.[4]

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3. The form of the suggested order is the same in the 1977 edition of the *Manual*.

The 1977 edition also appears at 1 Pt. 2 Moore's Federal Practice, Part II, ¶ 1.41, at 226-28 (2d ed. 1979) and Wright & Miller, *Manual for Complex Litigation*, Part II, § 1.41 at 188-89 (1977).

4. The order, as modified, provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed

The persons enjoined are "all parties hereto and their counsel."

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addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement

The subject matter forbidden is communications with any actual or potential class member not a formal party,

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of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

Bernard v. Gulf Oil Co., supra, 596 F.2d at 1258 n. 9.

"concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this Court." More specific communications that the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; and (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The order contains several exceptions, set out in the second subparagraph of ¶ (2): communications between attorney and client, and between attorney and prospective client, when initiated by the prospective client, and communications in the the regular course of business.

The third subparagraph of ¶ (2) is a much-debated provision requiring post-communication filing with the court of any communication asserted to be constitutionally protected:

> If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

The order also contains a provision that the clerk of the district court send a notice to those employees covered by the conciliation agreement who have not signed receipts and releases for back pay. The notice, which is an appendix to the order, tells the employee that this case is pending, and briefly describes it, and that he has been identified as an actual or potential class member. It describes the outstanding conciliation offer from Gulf and tells the employee that he has a choice of accepting the Gulf offer or declining it and being considered at a later date for inclusion in the class in the suit. Employees are told they have 45 days in which to accept the conciliation offer.

III. *The basis for the order*

Presumably, since the district court made no findings, its order was based upon suggestions contained in the *Manual,* which recommends that procedures be devised to anticipate and prevent potential abuses in class actions, including solicitation of representation, solicitation of funds and of opt-out requests, and misrepresentations that may create confusion and reflect adversely on the court or the administration of justice. *Manual,* Part I, § 1.41. The *Manual* recommends that district courts adopt local rules imposing "in every potential and actual class action" substantially the ban on communication that is here involved, and in the absence of a local rule[5] impose the ban by an order entered promptly after the filing of any actual or potential class action. *Id.* Part I, § 1.41; Part II, § 1.41 (Suggested Local Rule 7 and Suggested Pre-

5. The district court here involved had not adopted a local rule.

trial Order No. 15).[6] Our interpretation of the basis for the court's order is reinforced by the court's rejection of plaintiffs' constitutional arguments on the ground that the order it had entered comported with the requirements of the *Manual.*

We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would have been procedurally improper and without evidentiary support. Rather the court appears to have acted upon the rationale of the *Manual* that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual.*[7]

IV. *The order is a prior restraint*

The order represents a significant restriction on First Amendment rights. Because no other court of appeals has ruled on the constitutionality[8] of the *Manual's* sug-

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6. The only significant difference between the suggested local rule and the suggested pretrial order is the wording of the rule's "constitutional right" exception. The suggested rule provides: "Nor does the rule forbid communications protected by a constitutional right." It then imposes the same post-communication filing requirements that the order does. While we here consider the constitutionality of the *Manual's* suggested order, much of our analysis is equally applicable to the suggested local rule. *See* n. 22 *infra.* The semantic change does not alter the thrust of the rule.

7. The panel majority interpreted the district court's action as we do. It treated Gulf's charges as irrelevant and considered that the district court had plenary power in a class action to ban communications by a prophylatic order. 596 F.2d at 1261 n. 14.

8. In 1975 the Third Circuit raised the constitutional issue and expressed its doubts about the power of the district court to impose

gested rule and order, and because of the broad impact

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a prior restraint on communication or association in *Rodgers v. U. S. Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975) (*Rodgers I*):

> The imposition of such a condition [prior approval] upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3d Cir.), *cert. granted*, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Incc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).
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> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney, supra*, and *Bridges v. California, supra*, would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, *supra*, at 29 n. 28.

508 F.2d at 162-63, 165. However, the Third Circuit elected to proceed on a statutory ground, and no circuit has since directly confronted the constitutional issue.

The Second Circuit, in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972), rested its refusal to overturn a similar restriction on the unreviewability of discretionary orders by writ of mandamus, and thus did not deal with the constitutionality of the order.

The 1977 edition of the *Manual* adhered to the position of the 1973 edition. The 1978 Supplement reviews the division in the

of the *Manual's suggestions*,[9] we address the constitutional issues before us.

[1] We hold that the order entered in this case is an unconstitutional prior restraint.

[2] Prior restraints on freedom of speech have long been disfavored in American law. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). While a prior restraint is not unconstitutional per se, there is a heavy presumption against its constitutionality. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448, 459 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1, 5 (1971). We discuss in Part VI, below, the circumstances under which a prior restraint may be held lawful.

[3] Prior restraint has traditionally been defined as a "predetermined judicial prohibition restraining specified expression. . . ." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976); *see also Nebraska Press Association v. Stuart*, 427 U.S. 539,

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authorities concerning the validity of the recommended rule and order, but concludes:

> [T]here should be no modification of the foregoing recommendations or of the sample rule and order based thereon, except when a controlling decision of the court of appeals of the circuit requires it.

Id., Part I, § 1.41, p. 3.

9. The local rule suggested by the *Manual* has been adopted in numerous districts. *See* S.D. Fla. R. 19; N.D. Ga. R. 221.2, 3; N.D. Ill. R. 22; D. Md. R. 20; M.D. N.C. R. 17(b)(6); S.D. Ohio R. 3.9.4; S.D. Tex. R. 6; W.D. Wash. R. 23(g). No doubt many ban orders have also been entered independently of local rules, on the suggestion of the *Manual*. *See, e. g., NOW v. Minnesota Mining and Manuf. Co.*, 18 FEP Cas. 1177 (D. Minn. 1977).

559, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683, 697-98 (1976); *Near v. Minnesota, supra;* Litwack, *The Doctrine of Prior Restraint,* 12 Harv.C.R.-C.L.Rev. 519, 520 (1977). This expansive definition has not often been further elaborated. There are, however, four separate but related features that may serve to distringuish prior restraints from limitations on free speech imposed by subsequent restraints.

[4] *1. Origin.* A prior restraint is generally judicial rather than legislative in origin, although an enabling statute may authorize the judicial suppression of publication. *Near v. Minnesota, supra.* The essence of prior restraint is that it places specific communications under the personal censorship of the judge. Kalven, *Foreword: Even When a Nation is at War,* 85 Harv.L.Rev. 3, 33 (1971) [hereinafter Kalven].[10]

The district court's order is undeniably judicial in origin.[11]

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10. The classic prior restraint is an administrative licensing scheme adopted pursuant to a statute. The licensor has broad discretion with regard to each publication to be restrained. *See, e. g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Penthouse Int'l, Ltd. v. McAuliffe,* 610 F.2d 1353, 1359-61 (5th Cir. 1980). The distinction between this type of scheme and a more general legislative enactment is that the restraint operates only on specific publications, chosen by the administrator. There is thus less room for diversity to exercise its "tendency to break and control the violence of faction." The Federalist No. 10 (Madison). The same danger exists with respect to judicial restrictions on free speech; indeed, most of the more recent prior restraint cases have involved judicial rather than administrative licensing. *See, e. g., Nebraska Press Association v. Stuart, supra; New York Times Co. v. U. S.,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

11. We need not pass on the validity of the distinction made by the Seventh Circuit in *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248, between courts as judicial bodies and courts as

2. Purpose. It has been suggested that the sole purpose of a prior restraint is suppression rather than punishment. *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 558-59, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *Near v. Minnesota, supra,* 283 U.S. at 715, 51 S.Ct. at 630, 75 L.Ed. at 1367. Unlike a criminal statute, which by its terms defines the punishment for its violation, a prior restraint "does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." *Near, supra,* 283 U.S. at 715, 51 S.Ct. at 631, 75 L.Ed. at 1367. The justification for drawing a distinction based on this difference is that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *see also New York Times Co. v. U. S.,* 403 U.S. 713, 733, 91 S.Ct. 2140, 2151, 29 L.Ed.2d 822, 836 (1971) (White, J., concurring).

Without question, the purpose of the order is restraint upon publication.

3. Means of enforcement. This distinction between prior and subsequent restraints is inextricably linked to the prior restraint's judicial origin and unique purpose. "Punishment by contempt is an important attribute of a 'prior restraint' that distinguishes it from a criminal statute that forbids a certain type of expression." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248. The

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rulemaking or quasi-legislative bodies. However, since the instant order was promulgated in the course of litigation and not as a local rule, it satisfies even that Circuit's definition of a judicial restraint.

penalty is thus both more swiftly imposed and less subject to the mitigating safeguards of the criminal justice system than is the punishment for violation of a statute. *See Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2802, 49 L.Ed.2d at 697-98; *U. S. v. Gurney,* 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). This lack of safeguards accentuates the dangers inherent in any suppression of speech. *See Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459-60; *In re Halkin,* 598 F.2d 176, 184, n. 15 (D.C. Cir. 1979).

The expression restrained in this case is not forbidden by any statute. The text of the order is silent as to means of enforcement,[12] and there are other possible means available,[13] but the appellees accept that the means of enforcement intended is the contempt power of the court, and we agree.[14]

The dangers associated with the penalty of contempt inhere even though other sanctions are to some extent available. Persons subject to the order before us could

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12. The *Manual* is silent also.

13. Possibly the court could penalize a plaintiff attorney who disobeyed the order by removing him as attorney for the class, or deny or withdraw class action status, *Halverson v. Convenient Food Mart, Inc.,* 458 F.2d 927 (7th Cir. 1972); *Korn v. Franchard Corp.,* 456 F.2d 1206 (2d Cir. 1972); *Kronenberg v. Hotel Governor Clinton, Inc.,* 281 F.Supp. 622 (S.D. N.Y. 1968), or remove as class representative a plaintiff who disobeyed. Sanctions such as these would not be available, however, against defendants and their counsel. With respect to them, contempt would seem to be the only available sanction.

14. Contempt here would be criminal because used to punish past misconduct. *In re Timmons,* 607 F.2d 120, 123-24 (5th Cir. 1979).

reasonably conclude that the court's contempt power extended to enforcement of the order, and the conclusion is inescapable that it was exposure to contempt that silenced plaintiffs' attorneys and caused them to ask leave of court to send out the notice to class members.[15]

Moreover, the potential availability of other sanctions cannot serve to reduce the constitutional infirmity of the order. This prong of the test is concerned primarily with the lack of procedural safeguards associated with the enforcement of prior restraints. The fact that contempt is only one of several alternative sanctions does not ameliorate this concern.

[5-7] *4. Means of constitutional challenge.* While the unconsitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings. *Compare Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) *with Walker v. Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *see U. S. v. Dickinson,* 465 F.2d 496 (5th Cir. 1972), *cert. denied,* 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973) (applying rule against collateral attack to judicial restriction on publication); *cf. In re Timmons,* 607 F.2d 120, 124-25 (5th Cir. 1979) (similar distinction between civil and criminal contempt). Thus, a prior restraint may be distinguished from a statute prohibiting

15. One who may be willing to violate a statute, and thus risk criminal penalties, may be less willing to act in direct defiance of an injunction or court order and thus subject himself to the court's potential contempt power. *See in re Halkin, supra,* 598 F.2d at 184 n. 15; *Rodgers I, supra,* 508 F.2d at 161; Kalven, *supra,* 85 Harv. L. Rev. at 34 & n. 156; Note, 88 Harv. L. Rev. 1911, 1922 (1975).

publication in that the former has "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L.Ed.2d at 698. As one commentator has eloquently observed: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech." A. Bickel, The Morality of Consent 61 (1975), *quoted in Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring).

The impact of the present order was direct and immediate. It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, questioned by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue[16] despite the contentions of plaintiffs' counsel that some of the issues in the suit were not covered by the conciliation agreement to which plaintiffs and putative class members were not parties and that the conciliation benefits to the putative

16. Exception (2) in the second subparagraph of ¶ (2) permits communication between attorney and client, and between attorney and prospective client if on the initiative of a client or the prospective client. This provision concerning prospective clients is largely illusory; presumably, in a class action, a prospective client (class member) would often learn of the attorney from a present client (a named plaintiff), but here the present client is forbidden to talk to the prospective client.

class were inadequate. It stopped investigation and discovery at a time when it is critical, just after suit has been filed.

Fragile First Amendment rights are often lost or prejudiced by delay. *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring); *Zwickler v. Kooto,* 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444, 452 (1967); *Collin v. Smith,* 578 F.2d 1197, 1209 (7th Cir.), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed. 2d 264 (1978); *A Quaker Action Group v. Hickel,* 421 F.2d 1111, 1116 (D.C. Cir. 1969); Barnett, *The Puzzle of Prior Restraints,* 29 Stan.L.Rev. 539, 545 (1977). Courts have therefore been commendably willing to expedite proceedings involving First Amendment rights. *See New York Times Co. v. U. S., supra,* (Supreme Court decision issued 15 days after first TRO, 17 days after initial publication). Here, during the pendency of the conciliation offer, potential class members were substantially deprived[17] of the opportunity to confer with the attorneys presumably most knowledgeable, concerning whether they should accept Gulf's offer or look to the suit for redress. At the time they most needed counsel they were cut off from the attorneys most available until the time to make a choice had expired.[18]

The ban on communications is especially egregious both because this is a race discrimination case and because the counsel silenced without factual showing include

17. *See* n. 16 *supra.*

18. The impact of the restraint in this case is exacerbated by the inevitable delay associated with appellate litigation. The court en banc decides this case almost four years after the ban on communications was entered.

those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button*, 371 U.S. 415, 422, 83 S.Ct. 328, 332, 9 L.Ed.2d 405, 411-12 (1963), and engaged in "a different matter from the oppressive, malicious, or avaricious use of the legal process for private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 n.14 (5th Cir. 1970).

Faced with the principle that one who violates an injunction may not raise unconstitutionality as a defense in contempt proceedings, appellees construe the order to permit a defense to contempt. The constitutionally protected status of the proposed communication or the communicator's good faith belief in that status, appellees argue, would constitute a defense to contempt. This qualified defense is not found within the order but was read into it by the panel majority. 596 F.2d at 1261.

Even if this construction is correct, the defense is so freighted with preconditions and uncertainties that it is little comfort to attorney or party. Under appellees' construction, the filing requirement is a prerequisite to assertion of constitutionality, or good faith belief in constitutionality, as a defense.[19] Indeed it is only by the vehicle of the filing requirement that appellees read into the order a defense not otherwise available in a contempt case.[20]

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19. It is not contended that the act of filing is an absolute defense to contempt. There would be little purpose in entering an order with such a meaning.

20. Facially the filing requirement is nothing more than a means of notice to the court, unrelated to a defense of contempt. No one advances this interpretation, and we doubt it was intended.

The filing requirement itself chills expression. With respect to the individual class members, filing within five days a "complete summary" of every oral communication about the case had by each class member with any of his black fellow employees, is a practical impossibility. Beyond that, knowledge of what may be constitutionally protected is not readily available to the usual employee. In a real sense, for the individual plaintiffs silence is the only alternative. An attorney will have the knowledge, and better means, to file reports with the court as required, but if he asserts that he is constitutionally entitled to talk with prospective clients, ask financial aid, or seek support from a group or the community, filing will be a substantial burden. An attorney claiming a constitutional right to talk with witnesses could find compliance well nigh impossible. Also, the filing requirement arguably runs afoul of the attorneys' work product rule of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

The conditional defense is accompanied by a second chilling effect, the risk of trial on criminal contempt charges, with guilt or innocence possibly turning on whether one's assertion of constitutional protection has been made in "good faith." Moreover, the omissions and ambiguities of the order and possible differing constructions as to when if at all, one is protected against contempt, accentuate the chilling effect.[21]

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21. For example, in addition to the general ban on communications, subparagraph (a) of ¶ (2) expressly forbids solicitation. Prudent counsel very well may conclude that he cannot safely rely upon asserting constitutional protection in the face of this specific ban—if there is a "good faith" defense can counsel be in good faith if he does what he is expressly ordered not to do? As one commentator has noted:

The proviso exempting constitutionally-protected communication

Most attorneys, faced with an order like the one before us,[22] would pursue the course chosen by counsel in this case and seek prior approval of the court before attempting to communicate with actual or potential class members. *See In re Halkin, supra,* 598 F.2d at 184 n.15; *Goldblum v. National Broadcasting Corp.,* 584 F.2d 904, 907 (9th Cir. 1979).

Thus despite the filing provision, and the arguable "good faith" defense, the order has the "immediate and irreversible" effect of a prior restraint.

V. *The expression that is restrained is protected*

[8-10] Inquiry does not end with a determination that the order constitutes a prior restraint. The First Amendment is not absolute, and "the protection even as to previous restraint is not absolutely unlimited." *Near v. Minnesota, supra,* 283 U.S. at 716, 51 S.Ct. at 631, 75 L.Ed. at 1367; *accord, Times Film Corp. v. Chicago,* 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). Material unequivocally not protected by the Constitution may be the subject of a prior restraint if sufficient procedural safeguards are provided. This possibility does not exist in the present case because the communications proscribed by the order are constitutionally protected. Also, as discussed in Part VI, below, procedural safeguards are entirely lacking.

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does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule.

Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975). *See also Zarate v. Younglove,* 22 FEP Cases 1025, 1042 (C.D. Cal. 1980).

22. The deficiencies are present in both the order and the suggested local rule. *See* n. 6 *supra.*

The restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients. The attorneys may not counsel a black employee free of any effort to solicit him. We have already noted, at the beginning of Part IV, the concern expressed by the Third Circuit in *Rodgers I*, 508 F.2d at 162-63, 165, over the constitutional problems raised by conditioning access to class action procedures upon prohibiting communications between counsel and potential class members.

In addition to the general restraint on attorneys there is a specific restriction against solicitation in subparagraph (a) of ¶ (2) of the order which forbids "solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action." *NAACP v. Button, supra*, and its progeny, *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagraph (a) proscribes constitutionally protected expression. In *Button*, the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[23] The solicitation was treated as a mode of political expression effectuated through group activity falling with the sphere of associational rights

23. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At these meetings forms were circulated which authorized Legal Defense Fund attorneys "to represent the signers in legal proceedings to achieve desegregation." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*. Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of Legal Defense Fund lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the Legal Defense Fund lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case. *See also Great Western Cities, Inc. v. Binstein*, 476 F.Supp. 827 (N.D. Ill. 1979) (holding rule

similar to district court's order constitutionally inapplicable to non-profit solicitation).

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra.* There the Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of the litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the case, and the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's punishment of Primus for solicitation violated her First Amendment rights.[24] Counsel for plaintiffs here have submitted affidavits attesting to the fact that they neither received nor expect to receive from class members any compensation for their services.[25]

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24. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus,* sustained, against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain, he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication of illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida,* 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 482 Pa. 416, 393 A.2d 1175 (Pa. 1978).

25. Thus, subparagraph (b) of ¶ (2) of the order is not directly applicable. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar, supra,* the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of

[11] Of course, the communications of individual plaintiffs, also proscribed by the order, are at least equally protected. *See Brotherhood of Railroad Trainmen v. Virginia State Bar, supra; Great Western Cities, Inc. v. Binstein, supra.*

The communications covered by the order are thus protected expressions which call into play the full panoply of First Amendment safeguards against prior restraint.[26]

VI. *The prior restraint is not justified*

The order in this case is the essence of prior restraint —it places specific communications under the personal censorship of a judge. It is thus subject to the heavy presumption against its constitutionality and the rigid

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the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. Such activity is therefore deserving of constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672, 673 (S.D. Ohio 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Pa. 1974), *modified*, 69 F.R.D. 117 (1975); *see generally* Note, *Solicitation By Attorneys: A Prediction and a Recommendation*, 16 Houston L. Rev. 452 (1979).

26. We do not discuss at length the plenary provisions of subparagraph (d) of ¶ (2) concerning statements tending to misrepresent. That section merely compounds the unconstitutionality exhibited by the preceding sections by adding vagueness and overbreadth to its defects. *See Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Zarate v. Younglove*, 22 FEP Cases 1025, 1042 (C.D. Cal. 1980); *U. S. v. Marcano Garcia*, 456 F.Supp. 1354 (D. P.R. 1978); Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975).

requirements imposed by the courts on those who seek to justify prior restraints. It must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. It must prevent direct, immediate and irreparable damage, and it must be the least restrictive means of doing so. Finally, it must comport with required procedural safeguards. The order at issue meets none of these requirements.

[12] There is a strong presumption against the constitutionality of any prior restraint, and the burden of justification is therefore heavier than that imposed in cases involving only subsequent restrictions on freedom of expression. *Southeastern Promotions, Ltd. v. Conrad, supra; New York Times Co. v. U. S., supra; Organization for a Better Austin v. Keefe, supra; Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Near v. Minnesota, supra; Penthouse Int'l Ltd. v. McAuliffe, supra; Universal Amusement Co. v. Vance,* 587 F.2d 159 (5th Cir.), *aff'd,* ____U.S.____, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

[13] In general, a prior restraint may be justified only if the expression sought to be restrained "surely [will] result in direct, immediate, and irreparable damage." *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 833 (5th Cir. 1979), *quoting New York Times Co. v. U. S., supra,* 403 U.S. at 730, 91 S.Ct. at 2149, 29 L.Ed.2d at 834. At least three justices may have rejected even that standard as overly lenient, without explicitly defining the appropriate test. *See New York Times Co. v. U. S., supra,* 403 U.S. at 732-33, 91 S.Ct. at 2150-51, 29 L.Ed.2d at 835 (White, J., joined by Stewart, J., concurring), and 403 U.S. at 740-41, 91

S.Ct. at 2154-55, 29 L.Ed.2d at 840 (Marshall, J., concurring).[27]

[14] To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints," *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459; that is, "[the] publication [sought to be restrained] must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . ." *New York Times Co. v. U. S., supra,* 403 at 726-27, 91 S.Ct. at 2148, 29 L.Ed.2d at 832 (Brennan, J., concurring); *see also Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095, 1106 (1927) (Brandeis, J., concurring) ("Only an emergency can justify repression"). Indeed, one commentator has interpreted *New York Times v. U. S.* to hold that "there is a constitutional requirement that everything, or virtually everything, is entitled to be published at least once." Kalven, *supra,* 85 Harv.L.Rev. at 34.

[15-17] The order is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23. As the Third Circuit noted in *Rodgers I:* "[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163. It is obvious that in the conduct of trial the judge restrains

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27. Justices Black and Douglas, adhering to their consistent rejection of any restriction on freedom of expression, also found the standard unacceptable. 403 U.S. at 714, 720, 91 S.Ct. at 2141, 2144, 29 L.Ed.2d at 825, 828.

expression and association in innumerable ways. But, "[w]hatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world." *Id.*

[18, 19] The Supreme Court has recently reaffirmed that even when the competing interest is a criminal defendant's right to a fair trial, "the barriers to prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 570, 96 S.Ct. at 2808, 49 L.Ed.2d at 704. Other courts, including this one, have echoed this sentiment. "[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " *U. S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974). A lawyer's First Amendment right to comment about pending or imminent criminal litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 249, *quoting In re Oliver,* 452 F.2d 111 (7th Cir. 1971). Even in the context of a criminal defendant's right to a fair trial, then, prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L.Ed.2d at 697.

[20-22] If the exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior

restraints, the interests of a civil litigant cannot do so. *See Hirschkop v. Snead, supra,* 594 F.2d at 373. The "interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." *Rodgers I, supra,* 508 F.2d at 163. Thus, the general presumption against prior restraints is not mitigated by a claim that the fair and orderly administration of justice is at stake.[28]

[23-28] Nor does Rule 23, as a specific aspect of the administration of justice, create an exception to the

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28. We must distinguish two types of cases as only peripherally relevant to the inquiry at hand. *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and their progeny limited the circumstances under which courts may impose contempt sanctions for free expression that is subsequently deemed prejudicial to the administration of justice. Because the contempt in those cases was not based on violation of an explicit order, however, the cases "deal with problems substantially different from those raised by prior restraint." *Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 557 n.5, 96 S.Ct. at 2802, 49 L.Ed.2d at 696 n.5; *see also Rodgers v. U. S. Steel Corp.,* 536 F.2d 1001, 1008 n.15 (3d Cir. 1976) (*Rodgers II*); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory,* 29 Stan. L. Rev. 431, 472 (1977). Thus, the *Manual's* conclusion that *Craig* and *Bridges* authorize the suggested order, Part 1, § 1.41 n.33 (1977 ed.), is mistaken insofar as the order is a prior restraint and governed by a more stringent standard. *See* Wilson, *Control of Class Action Abuses Through Regulation of Communications,* 4 Class Action Reports 632, 634 (1975).

We also find *Gannett Co. v. DePasquale,* 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), and its antecedent inapposite. We are dealing here not with the right of reporters to gather information but with the right of individuals to disseminate it. *See, e. g., Houchins v. KQED, Inc.,* 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978); *U. S. v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). Protecting secrecy by excluding the press is not to be equated with preventing publication. *See* Sack, Principle and Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 411, 428 (1977); Stevens, *Some Thoughts About A General Rule,* 21 Ariz. L. Rev. 599 (1979).

principals governing prior restraints.[29] *See Rodgers v. U. S. Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) *(Rodgers II)* (suggesting, in context of class action, that test is "clear and present danger or a reasonable likelihood of a serious and imminent threat to the administration of justice"). The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contexts. Subdvision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further "the fair and efficient conduct of the action . . . ." Advisory Committee Notes to Rule 23. Like the common law contempt power at issue in *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), the court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights. Prior restraints are no less suspect in a statutory setting than they are in a constitutional context. *Allen v. Monger*, 583 F.2d 438, 442 (9th Cir. 1978), *pet. for cert. filed sub nom., Brown v. Allen*, — U.S. —, 100 S.Ct. 1003, 62 L.Ed.2d 745 (1978). We cannot interpret Rule 23 as authorizing

29. The district court never certified a class in this case. Arguably a court may have broader power over an actual class action than a putative class action, but the presence or absence of certification does not materially affect the considerations that we view as controlling.

prior restraints without rewriting the First Amendment and the gloss put upon it by the Supreme Court. This, of course, we are not at liberty to do. Moreover, the Rules Enabling Act, 28 U.S.C. § 2072, explicitly provides that the Rules "shall not abridge, enlarge or modify any substantive right." Finally, much of the communication prohibited by the order is both constitutionally protected and consistent with the purposes of the class action. *See Coles v. Marsh,* 560 F.2d 186, 189 (3d Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977); n.30 *infra.*

[29-30] An exception to the constitutional principles limiting prior restraints cannot be construed on the foundation of asserted potential abuses in class actions generally. In the first place, the hypothesis that abuses occur with such frequency and impact that prophylactic judicial intervention is required must be examined with the same scrutiny as other factual hypotheses. Neither the Constitution nor the judge's duty of constitutional fact finding is subsumed by the application of the pejorative word "abuse." Not everything that tends to make a class action less convenient than ideal, or more difficult to manage, is an "abuse." The same is true of such activities as solicitation of clients, or funds, or community support, that may be constitutionally protected but, at least to some, may appear only marginally ethical.[30] The

30. In *Coles v. Marsh,* 560 F.2d 186 (3d Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), a race/sex discrimination in employment case, the basis for an order banning communication by plaintiff and her lawyer was plaintiff's deposition in which she indicated that she had contacted and would continue to contact potential class members with the hope of interesting them in participating in the suit and had contacted the NAACP to enlist its support, financial and otherwise, and proposed to contact other

frequency and the effect of genuine abuses in class actions in general are not revealed by any empirical data made known to us, and judges may differ widely in their individual assessments. The *Manual* expressly recognizes that "abuse" of the class action is a rare occurrence, an exception and not the rule:

> It must be noted, however, that, generally, the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order.

Manual, Part I, § 1.41, p. 31 (1977 ed.). Its rationale is that it is desirable to anticipate and prevent these infrequent occurrences before they happen.[31]

In any event, the potential abuse rationale is at odds with the requirement that a prior restraint is only justified in exceptional circumstances and by a showing of direct, immediate and irreparable harm. Whether such a showing can be made may be affected by a host of factors: the occurrence of misconduct or the threat of it, the composition and size of the class, the nature of the claim,

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organizations for the same purpose. The Third Circuit rejected the argument that these were abuses and held they affectuated the purposes of Rule 23 by encouraging participation in plaintiff's race/sex discrimination claim and that the district court had no power to restrain them.

31. *Compare Bulletin of Recent Developments, Manual for Complex Litigation,* Aug. 25, 1978, p. 7:

> Experience continues to teach that, because of the vast and ever-present potential for abuse of the class action through unauthorized communications in many unpredictable forms, it is dangerous to await the occurrence of an abuse before trying to correct it.

the historical policies of the district court in administering class actions, the identity, experience and standards of the lawyers, the mores of the bar, the necessity for discovery and many others. None of the four major potential abuses listed by the *Manual* presents any direct or immediate threat to the litigation in this case. Solicitation of clients is protected here under *Button and Primus. See* pp. 471-473, *supra.* The possibility of solicitation of funds is controverted by affidavits. *See* n. 25 *supra.* Solicitation of opt-out requests is not relevant to this Rule 23(b)(2) case. Finally, nothing justifies any inference in this case that communications are likely to "misrepresent the status, purposes and effects of the . . . action and of . . . [the] Court orders therein."

[31] There are other prerequisites to justification of a prior restraint. It must not sweep too broadly. Rather it "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *CBS, Inc. v. Young,* 522 F.2d 234, 238 (6th Cir. 1975); *see also Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). There are alternatives to a total ban on communications. *See* n. 13 *supra; Developments in the Law—Class Actions,* 89 Harv.L.Rev. 1318, 1600-1604 (1976); Wilson, *Control of Class Action Abuses Through Regulation of Communications,* 4 Class Action Reports 632 (1975). The order before us suppresses essentially everything, and one seeking to exercise his right to speech or association must petition the court.[32]

32. It is obvious that overbreadth is inevitable under a system by which plenary restraints are imposed automatically by rule or order in every actual or potential class action.

No showing has been made, or even offered, that reasonable alternatives with lesser impact are unavailable.

[32] Finally, the restraint "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459. There are none here: no evidence, no way to test the potential abuse premise, no findings of particular abuses present or threatened, and no conclusions of law (except as to the desirability of conciliation). Obviously, there never can be procedural safeguards if by rule or order a wholesale restraint is directed in every case and those restrained are able to escape its impact only by showing good cause to be excepted or risking the vagaries of an arguable good faith defense.

[33] The remaining justification for the order is the district judge's reference to his obligations to encourage private settlement of Title VII charges. *U. S. v. Allegheny-Ludlum Industries,* 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). The notice sent by the clerk gave judicial recognition to the conciliation agreement and extended the time during which employees could accept Gulf's offer while at the same time giving notice of the pendency of this suit. But, as we noted in *Allegheny-Ludlum,*

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 & n.26, *quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295, 302 (1975). In *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restituition.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice.

[34, 35] We therefore hold that the district court's order restricting communication by parties and their counsel with actual and potential class members is an unconstitutional prior restraint.[33] This holding makes it unneces-

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33. While we hold that the order is a prior restraint, the unconstitutionality of the order does not rest on that ground alone. Even under the more relaxed analysis accorded subsequent restraints the order fails to pass constitutional muster. Much of the order is vague and overbroad. *See* n.26 *supra; see also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*,

sary for us to consider whether the order violates the First Amendment associational rights of either the individual plaintiffs or their attorneys. *See Rodgers I, supra,* 508 F.2d at 163; *Great Western Cities, Inc. v. Binstein, supra,* 476 F.Supp. at 834; *cf. NAACP v. Alabama ex rel Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (requiring NAACP to submit membership lists infringes associational rights); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (requiring list of organizations to which individual belongs or contributes infringes associational rights); *Robinson v. Reed,* 566 F.2d 911 (5th Cir. 1978) (requiring disclosure of facts about beliefs or associations infringes rights of privacy and association).[34]

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427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976). Even a legitimate governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960); *see also Village of Schaumberg v. Citizens for a Better Environment,* _____U.S._____, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (restriction invalid if purpose "could be sufficiently served by measures less destructive of First Amendment interests"). Moreover, the circumstances under which the order was issued do not meet any of the previously articulated standards governing restriction of constitutionally protected expression. *See, e. g., Village of Schaumberg v. Citizens for a Better Environment, supra* (regulation "intimately related to substantial governmental interests"); *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech "intended to produce, and likely to produce, *imminent* disorder"); *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (speech "brigaded with action") (Douglas, J., concurring); *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) ("clear and present danger"); *Chicago Council of Lawyers v. Bauer, supra* (speech must pose " 'serious and imminent threat' of interference with the fair administration of justice").

34. We have also pretermitted discussion of the order's limitations on access to and dissemination of discovery materials as possibly implicating both the First Amendment, *In re Halkin, supra,* 598 F.2d

VII. *The order violates Rule 23*

[36] Because we hold that the order violates the First Amendment, it follows that it cannot be an "appropriate order" under Rule 23(d) of the Federal Rules of Civil Procedure.[35]

The order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members is VACATED, the judgment of the district court is REVERSED and the case is REMANDED to the district court for proceedings consistent with this opinion.

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at 188-89, and the due process clause of the Fifth Amendment, *Gouldman v. Seligman & Latz of Houston, Inc.*, 82 F.R.D. 727, 728 (S.D. Tex. 1979). *See Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782, 787 (E.D. La. 1977); Note, 88 Harv. L. Rev. 1911, 1919 (1975). The *Manual* itself notes the risk that barring contact with class member-witnesses may violate due process:

> In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.

Manual, Part I, § 1.41, p. 29 (1977, carried forward from 1973 ed.).

Additionally, we have not considered whether the order may violate the Fifth Amendment privilege against self-incrimination by compelling those who may have disobeyed it to produce testimonial evidence describing their transgressions. *See U. S. v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); *U. S. v. Authement*, 607 F.2d 1129 (5th Cir. 1979).

35. Other circuits have reached conflicting conclusions as to the propriety under Rule 23 of similar orders. *Compare Rodgers I, supra with In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1138 n.57 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

TJOFLAT, Circuit Judge, with whom JOHN R. BROWN, GEE, HENDERSON and REAVLEY, Circuit Judges, join, specially concurring:

I concur only in the result because I believe the majority's analysis inexcusably ignores the principle that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine,* 415 U.S. 528, 547, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577 (1974). The non-constitutional ground that would dispose of the case is that the district court abused its discretion when, without making findings of fact, it entered the order restricting the parties' and counsel's communications with actual or potential class members who were not formal parties.

The majority's analysis begins with an examination of the "basis" of the order. The opinion immediately rejects the notion that the district court's order could have rested on Gulf Oil Company's unsworn allegations that one of the plaintiffs' attorneys had improperly communicated with actual or potential class members who were not formal parties: "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did . . . ." *Ante* at 466. Even if the district court *had* based its order on a conclusion that Gulf's charges were true, the opinion reasons, "such a conclusion would have been procedurally improper and without evidentiary support." *Id.* Therefore, the majority "presumes" that the district court must have based its order "upon the rationale of the [*Manual for Complex Litigation*] that the court has the power to enter a ban on communications in any actual or potential class action as

a prophylactic measure against potential abuses envisioned by the *Manual." Id.*

Logic and sound jurisprudence insist that the majority next consider the procedural propriety and evidentiary support of an order founded solely on the rationale and model order of the *Manual.* Instead, the opinion inexplicably leaps to the question of the constitutionality of the *Manual's* suggested order and holds that the order is an unconstitutional prior restraint. Since the district court's order was based entirely on the model order and policy consideration set out in the *Manual,* it follows that the district court's order is unconstitutional as well. The opinion then belatedly and, in light of the disposition of the constitutional issue, somewhat gratuitously turns to the question of procedural propriety, concluding that an unconstitutional order cannot be "appropriate" within the meaning of Fed.R.Civ.P. 23(d).

In my view, the federal policy of avoiding unnecessary constitutional rulings requires that this court reserve consideration of the first amendment problems that the district court's order may raise and address first the question of the district court's authority to issue the order. As Judge Godbold persuasively demonstrates in his dissenting opinion to the panel decision, the district court misused its discretion in entering the order in this case. *Bernard v. Gulf Oil Co.,* 596 F.2d 1249, 1262-76, *vacated,* 604 F.2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part). Therefore, we need not reach the constitutional question.

Rule 23(d) permits district courts, in conducting class actions, to "make appropriate orders: . . . (3) imposing conditions on the representative parties . . . ." Although

this provision gives a district court "extensive power" to manage a class action, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 at 192 (1972), the orders that a court issues pursuant to the rule are certainly subject to review for abuse of discretion. *In re Nissan Motor Corporation Antitrust Litigation,* 552 F.2d 1088, 1096 (5th Cir. 1977). As this court observed in *Nissan,* "Appellate review is necessary to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision." *Id.* The reviewability of rule 23(d) orders is also implicit in the language of the rule. The district court is limited to issuing those orders that are "appropriate." If this constraining language is to be effectual, rule 23(d) orders must be reviewable by the courts of appeals.

Since rule 23(d) orders are reviewable, it follows that such orders must be based on findings of fact:

> [I]ssuance of an order . . . without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978) (citations omitted) (vacating and remanding district court's order denying attorney fees to successful civil rights plaintiff). *Cf. Fed.R.Civ.P.* 52(a) ("in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action").

The general principle restated by the *Sargeant* court applies to any court order that is based on the court's assessment of conflicting evidence or policy considerations. I see no reason to suppose that the principle is not pertinent here. A request for a rule 23(d) order restricting communications between counsel and potential or actual class plaintiffs is not essentially different from an ordinary petition for a preliminary injunction.[1] Communications like those prohibited by the district court's order certainly create a potential for abuse, but they may also be beneficial. For example, such communications, "in many instances serve to effectuate the 'purposes of Rule 23 by encouraging common participation in [a lawsuit].' " *Bernard v. Gulf Oil Co.*, 596 F.2d at 1268 (Godbold, J., dissenting) (*quoting Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). Just as if it had been faced with a request for an injunction, the district court should have ruled on Gulf's motion for an order restricting communications only after weighing, on the record, the potential for abuse that would be generated by permitting free communications between the parties and class members against the benefits flowing from such communications.

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1. Judge Godbold makes this point nicely in his panel dissent:
> The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

Bernard v. Gulf Oil Co., 596 F.2d 1249, 1270, *vacated* 604 F.2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

As in the ordinary case involving a request for a temporary injunction, the burden of proof would be on the movant—here, Gulf. To meet its burden of proof, Gulf would have to make "a factual showing . . . that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened." *Bernard v. Gulf Oil Co.*, 596 F.2d at 1267 (Godbold, J., dissenting).

As the majority opinion notes, the district court entered the order in this case without making any findings of fact. The only "evidence" Gulf presented that the restricted communications would lead to abuses was unsworn allegations of misconduct on the part of one of the class attorneys, and the accused attorney denied the charge under oath. Even if the district court had explicitly based its order on Gulf's charges, I would find that entry of the order was an abuse of discretion on the ground that Gulf had not conceivably met its burden of proof. It is still more clear that the Court abused its discretion by issuing the order without elucidating *any* factors that contributed to its decision.

The absence of any findings of fact leads the majority to conclude that the district court founded its order on the *Manual for Complex Litigation's* model order and rationale. *Ante* at 466. In my view, the record does not adequately support this conclusion. The district court cited the *Manual* not to justify the imposition of the order, but to defend the order from plaintiffs' First Amendment attack: "[T]his order comports with the requisites set out in the *Manual for Complex Litigation*,

Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court." *Record* at 128e. The court's mere mentioning of the *Manual* obviously does not constitute the deliberate articulation of rationale that is necessary if there is to be any possibility of meaningful review.

Moreover, even if the court had relied explicitly on the rationale of the *Manual's* model order to support the order, the court's entry of the order would have been procedurally improper. The *Manual* is not a source of authority with the force of a statute or rule of civil procedure. Therefore, a trial court could not evade its responsibility to make findings of fact on the record simply by relying on the *Manual.* In other words, it would have been an abuse of discretion for the court to have adopted the *Manual's* apparent conclusion that a court order restricting communications is appropriate in *every* class action. This is because the validity of the *Manual's* analysis and conclusion is not the sort of undisputed knowledge that would justify what would be, in effect, judicial notice. Since there is reason to believe that communications between counsel and actual and potential class members are not *always* abusive of the class action device, "[t]he *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case." *Bernard v. Gulf Oil Co.,* 596 F.2d at 1268 (Godbold, J., dissenting).[2]

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2. Of course, there are some communications that a court may restrict, in the interests of the administration of justice, without making findings or even considering the facts of the particular case. For example, a trial judge may certainly instruct members of the

For the reasons I have stated, I would hold that the district court abused its discretion when it entered the order restricting communications. I think this conclusion is unavoidable, whether the order is viewed as based upon the trial judge's assessment of the particular case before him or as based on the *Manual's* general discussion of potential abuses. Therefore, I must regard the majority's first amendment analysis as a needless excursion into a difficult and little-explored area of constitutional law.[3]

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jury not to discuss a case with anyone while the trial is in progress. The crucial difference between this example and the case before us is that, first amendment considerations aside, there could be no purpose served by permitting the jury to discuss a case during the trial, while it is not open to question that such communications would always pose an imminent threat to the fair administration of justice. On the other hand, communications like those enjoined in the present case might actually benefit the judicial process through serving the rule 23 policy of encouraging common participation in a lawsuit. *See* p. 464, *supra*.

3. Although the majority concludes that the order in this case was an unconstitutional prior restraint, the opinion certainly does not preclude a district court's entering an order similar to the *Manual's* model order after making a proper finding of facts. The majority condemns only restrictions of communications "constructed on the foundation of asserted potential abuses in class actions generally," *ante* at 475, and admits that a "prior restraint" may be justified "by a showing of direct, immediate and irreparable harm." *Ante* at 476.

FAY, Circuit Judge, with whom COLEMAN, Chief Judge, and RONEY, Circuit Judge, join, special concurring statement:

The majority of the *en banc* court adopts parts I, II and III of the panel opinion found at 596 F.2d 1249. As to the order dealing with communications by named parties and their counsel with any actual or potential class member not a formal party, I adopt parts I and II of Judge Godbold's original opinion, concurring in part and dissenting in part from the panel majority. 596 F.2d at 1262. In my opinion the order was "inappropriate" under Rule 23 and an abuse of discretion in this case. So concluding, I would not reach the constitutional issues.

JAMES C. HILL, Circuit Judge, dissenting:

I cannot agree that an order restricting the conduct of attorneys and their clients in connection with an ongoing lawsuit should be scrutinized under the First Amendment. I believe that during the pendency of a lawsuit the judge may restrict speech and conduct which in a different setting would be protected by the First Amendment. A precedent which requires that such orders be scrutinized under the First Amendment is a dangerous one with the potential for consequences not intended by the majority.

The propriety of this order should be tested only under Rule 23's appropriateness standard. Under the facts of this case, I would hold that the order was appropriate.

JUDGMENT ON REHEARING EN BANC

[Caption Omitted in Printing]

Filed July 17, 1980

Before COLEMAN, Chief Judge, BROWN, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated; the judgment of the said District Court is hereby reversed, and this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plantiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 19, 1980

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* Judges Goldberg, Ainsworth and Charles Clark did not participate in the consideration or decision of this case.

Tjoflat, Circuit Judge, with whom Brown, Gee, Henderson and Reavely, Circuit Judges, join, concurring in the result.

Fay, Circuit Judge, with whom Coleman, Chief Judge, and Roney, Circuit Judge, join, specially concurring.

Hill, Circuit Judge, dissenting.

Issued as Mandate: July 15, 1980

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: BRENDA HAUCK
Deputy
New Orleans, Louisiana

ORDER ALLOWING CERTIORARI

[Caption Omitted in Printing]

Filed December 8, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to Question 1 presented by the petition.

FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, et al.,

Petitioners,

v.

WESLEY P. BERNARD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 80-441

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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GULF OIL COMPANY, et al.,

Petitioners,

v.

WESLEY P. BERNARD, et al.,

Respondents.

==========

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

==========

BRIEF IN OPPOSITION

==========

STATEMENT OF THE CASE

This case presents questions concerning (1) the timeliness of a class action challenging racial discrimination in employment under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, and (2) the validity of orders restric-

ting communications by the named plaintiffs and their counsel with actual and potential class members. The Fifth Circuit, sitting en banc, adopted the panel opinion insofar as it held that plaintiffs' individual and class Title VII claims were timely filed, that their § 1981 claims were not barred by the statute of limitations, and that none of their claims was barred by the doctrine of laches. The en banc court further held that an order restraining communications in this case violated the First Amendment to the Constitution and Rule 23, Fed. R. Civ. P.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for three reasons. (1) Petitioners have seriously misstated the facts and have distorted the record in a manner which obscures the issues in this case. (2) In holding that plaintiffs' action satisfied the statutory time limits of Title VII and was not barred by laches, the Fifth Circuit correctly applied settled legal principles in accordance with the decisions of the other circuits and of this Court. (3) In holding that

the plaintiffs and their counsel in this civil rights case could not properly be restrained from communicating with class members, the Fifth Circuit rejected the recommendations of prior editions of the Manual for Complex Litigation but followed the applicable decisions of the other circuits and of this Court. The Manual is now being revised in a manner which may bring it into conformity with these decisions.

ARGUMENT

Reasons for Denying the Writ

I. THE PETITION FOR CERTIORARI MISSTATES MATERIAL FACTS AND DISTORTS THE RECORD.

The opinions of the Fifth Circuit contain a full and accurate statement of the facts. See 596 F.2d at 1253-54 (Pet. App. C at 1-4)[1/] (panel majority opinion); 596 F.2d at 1263-67 (Pet. App. C at 24-32) (Godbold, J., dissenting); 619 F.2d at 463-66 (Pet. App. at 2-9) (en banc majority opinion). However, in petitioning this Court to

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1/ Citations in this form refer to the appendix to the petition.

review the en banc decision of the court below, Gulf Oil Company and the Oil, Chemical and Atomic Workers' Union have seriously misstated material facts and have distorted the record in a manner which obscures the issues in this case.[2/]

On the question of timeliness, for instance, petitioners incorrectly assert that the February 1975 letter from the Equal Employment Opportunity Commission to plaintiffs Bernard, Brown, and Johnson, "in essence, stated no further action was contemplated by the Commission" (Pet. at 6). In fact, this letter notified plaintiffs that Gulf did not wish to entertain conciliation discussions; it advised plaintiffs that they could request a "Notice of Right to Sue" at any time; and it stated that "you will have ninety (90) days from the date of its receipt [i.e., receipt of the Notice of Right to Sue] to file suit in Federal

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2/ Petitioners made the same false and misleading statements in their briefs to the Fifth Circuit. See Reply Brief for Appellants, at 3-8; Reply Brief for Appellants on Rehearing En Banc, at 2-10. That court rejected petitioners' version of the facts.

District Court."[3/] For more than a year following its issuance of this letter, the EEOC actively reviewed its files on Gulf in anticipation of possible litigation; it did not decide against bringing suit until March 1976 (see Brief for the EEOC as Amicus Curiae on Rehearing En Banc, at 3). Moreover, on the basis of a separate charge of discrimination which had been filed against Gulf by an EEOC commissioner in 1967, Gulf engaged in continuing conciliation discussions which culminated in its April 1976 conciliation agreement with the EEOC and the Department of the Interior (id. at 4).[4/]

3/ The full text of the letter is reprinted in the appendix to the petition (Pet. App. I at 3-4, 8-9, 13-14).

4/ Petitioners also erroneously state that plaintiffs Bernard and Brown received their right-to-sue notices on April 11, 1976 (Pet. at 6). The record shows that plaintiffs requested these notices and filed suit only after they had awaited the outcome of the EEOC administrative process and had determined that the relief provided by the conciliation agreement of April 14, 1976, was inadequate. Accordingly, the notices were not issued until June 11, 1976 (Pet. App. J). Plaintiffs subsequently amended their complaint, which had been filed in May 1976, to reflect their receipt of the right-to-sue notices.

Petitioners have also misrepresented and distorted the facts concerning the district court's orders restraining communications with class members. These orders were entered after attorneys for Gulf had made unsworn allegations, based on a report by an unidentified informant, that one of plaintiffs' counsel had made improper or unethical statements at a meeting with class members. See 619 F.2d at 463-64 (Pet. App. A at 3-4). As it did on the appeal to the Fifth Circuit, however, Gulf in its petition to this Court (Pet. at 7) "restates the hearsay as though it were fact proved and found." 596 F.2d at 1267 n.9 (Pet. App. C at 34 n.9) (Godbold, J., dissenting from the decision of the panel majority). Gulf never offered any evidence to support its allegations. As Judge Godbold noted below, "Counsel for Gulf treat more lightly charging an attorney with unethical and improper conduct that I would be willing to do." Id. at 1268 n.9 (Pet. App. C at 34 n.9).

Petitioners erroneously state that the first order restraining communications (the order of May 28, 1976) was entered "without formal

objection by Respondents" (Pet. at 7). In fact, Gulf's initial motion to limit communications with the class members was filed on May 27 (A. 14)[5/] and was granted ex parte the following day (A. 30-31). After plaintiffs received notice of the order, they filed a memorandum of law opposing Gulf's motion (A. 1, Dkt. Entry No. 40), and thereafter plaintiffs repeatedly opposed the gag orders in the district court (id., Nos. 40, 99, 129, 135).

Petitioners claim that the second order restraining communications (the order of June 22, 1976) was entered "after extensive briefing accompanied by affidavits and a hearing" (Pet. at 8; see also id. at 11). In fact, the only affidavits concerning this issue were submitted by plaintiffs' counsel, not by defendants; these affidavits demonstrated that no unethical or improper conduct had occurred or was likely to occur (A. 46-55). Moreover, the district court never held an evidentiary hearing on this question, but merely heard the oral arguments of

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5/ Citations in this form refer to the joint appendix filed in the Fifth Circuit.

counsel. Gulf never produced one shred of evidence, in an affidavit or in any other form, to substantiate its attorneys' allegations.

Petitioners incorrectly describe the order of June 22 as "permit[ting] constitutionally protected communications while limiting only those communications that had the purpose of solicitation and that tended to misrepresent the status, purposes and effects of the cause of action and that impeded the orderly administration of justice" (Pet. at 8). In fact, the order -- which is reprinted in full in the appendix to the petition (Pet. App. E) -- prohibits all communications concerning the case with any actual or potential class members unless the court has specifically approved both the proposed communication and the proposed addressees (Pet. App. E at 1-2). It excepts from its prohibitions (1) certain communications initiated by a client or prospective client and (2) certain communications occurring in the regular course of business (id. at 2-3). It requires that any constitutionally protected communication be filed with the court within five days after its occurrence (id. at 3). Finally, the order expressly states that the communications

which are forbidden are not limited to those involving solicitation or misrepresentation (id. at 2, ¶ 2), and it provides that all communications not specifically authorized in the order are strictly forbidden (id. at 4, ¶ 8).

Petitioners also assert that plaintiffs' July 6, 1976, motion to communicate with members of the proposed class "was denied as Respondents' communication[6/] tended to misrepresent the status, purposes and effects of the cause of action" (Pet. at 8) (footnote added). However, the district court made no such finding; instead, the court issued a one-sentence order denying the motion without any explanation or statement of reasons.[7/]

Thus, the petition misstates and distorts facts which are crucial to a proper determination of the issues in this case. Petitioners' failure to provide this Court with an accurate statement of the facts warrants the denial of their petition.

6/ The notice which plaintiffs proposed to distribute to the class members is reprinted in 596 F.2d at 1266 (Pet. App. C at 30-31).

7/ This order is reprinted in the appendix to the petition (Pet. App. L).

See Conway v. California Adult Authority, 396 U.S. 107 (1969).

II. IN HOLDING THAT PLAINTIFFS' EMPLOYMENT DISCRIMINATION ACTION WAS TIMELY, THE FIFTH CIRCUIT APPLIED SETTLED LEGAL PRINCIPLES IN ACCORDANCE WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

The Fifth Circuit found that the plaintiffs in this case reasonably awaited the completion of the EEOC administrative process before filing suit, and that any prejudice suffered by Gulf was caused not by plaintiffs' delay but by Gulf's own negligence and its destruction of personnel records in violation of EEOC regulations. The court therefore held that the plaintiffs' action was not barred by laches. This decision is consonant with all of the assertedly conflicting decisions cited by petitioners. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 373 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975); Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598, 603 (7th Cir. 1979); Boone v. Mechanical Specialties Co., 609 F.2d 956, 959-60 (9th Cir. 1979); Lynn v. Western Gillette, Inc., 564 F.2d 1282, 1287-88

(9th Cir. 1977).[8/]

The Fifth Circuit also held that the plaintiffs were not required to sue under Title VII within ninety days after receiving an EEOC letter advising them simply of the failure of conciliation, but were entitled to await receipt of clear notice that the administrative process had been completed. As petitioners have conceded, this decision is consistent with the decisions of all the other circuits,[9/] and it correctly interprets Title VII.[10/] Accordingly, there is no reason for this Court to review the question.

8/ In each of the cited cases, the court stated or held "that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief." Occidental Life Ins. Co. v. EEOC, supra, 432 U.S. at 373. The record here shows neither unexcused conduct by plaintiffs nor resulting prejudice to defendants.

9/ See the cases cited in the petition at 19, n.9.

10/ "At the time this suit was filed, a charging party was required to file a cause of action in federal court within 90 days of notice that the EEOC's administrative process had been completed. See 42 U.S.C. § 2000e-5(f)(1) (1976)." (Pet. at 19).

III. IN HOLDING THAT THE DISTRICT COURT'S ORDER RESTRICTING COMMUNICATIONS WITH CLASS MEMBERS VIOLATED RULE 23 AND THE FIRST AMENDMENT, THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

Petitioners presented no evidence to the district court, and the district court made no findings, that plaintiffs or their counsel either had engaged or were ever likely to engage in any improper or unethical conduct, or that their communications with class members posed any threat whatever to the administration of justice. Thus, the question framed by petitioners -- whether the district court could restrain speech "in order to prevent actual and potential abuses of the class action device" (Pet. at II) -- is not presented by this case. The real question presented here is whether, in the absence of any proof of an actual or even a potential abuse, plaintiffs and their counsel could properly be restrained from communicating with class members. The Fifth Circuit en banc, by a vote of 21 to one, correctly held that such restraints are impermissible.

Only one other circuit, the Third, has ruled on the validity of similar restrictions on communications by plaintiffs and their counsel with class members. That circuit has twice held that such restrictions are contrary to the purpose of Rule 23 and therefore are beyond the powers of the district courts. Rodgers v. United States Steel Corp., 508 F.2d 152 (3rd Cir.), cert. denied, 423 U.S. 832 (1975); Coles v. Marsh, 560 F.2d 186 (3rd Cir.), cert. denied sub nom Blue Cross v. Coles, 434 U.S. 985 (1977). The Fifth Circuit's en banc decision in the case at bar is fully consistent with Rodgers and Coles.

The Fifth Circuit's decision also is consistent with the many decisions of this Court holding that, in all but the most extreme circumstances, prior restraints on speech violate the First Amendment. See, e.g., Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931). As other circuits have recognized, the constitutional principles underlying these decisions apply to speech by lawyers and litigants about pending litigation: such speech can be restrained only if (1) it poses a

clear and imminent danger to the fair administration of justice, (2) the restraining order is narrowly drawn and precise, and (3) there is no less restrictive means of preventing the demonstrated harm. In re Halkin, 598 F.2d 176 (D.C. Cir. 1979); United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975).[11/] Here, there was no evidence of any danger whatsoever to the fair administration of justice, the restraining order was broad and all-encompassing, and no consideration was given to less restrictive alternatives. The Fifth Circuit thus correctly applied the constitutional principles established by this Court and adopted by other circuits in concluding that

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11/ Two circuits have adopted an ostensibly less rigorous standard, under which speech about pending litigation may be suppressed if it presents a reasonable likelihood of prejudice to the fair administration of justice. Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (en banc); United States v. Tijerina, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969). The difference between these two standards has no practical significance in this case, for the record here contains no evidence of any danger to the fair administration of justice.

the order restraining communications violated the First Amendment.

Finally, the Fifth Circuit's decision is consistent with this Court's decisions in NAACP v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978). The plaintiffs in the instant case are represented by attorneys associated with the NAACP Legal Defense and Educational Fund, Inc. In Button the Court held that, in promoting and conducting litigation to remedy racial discrimination, NAACP and Legal Defense Fund lawyers engage in constitutionally protected forms of expression and association. 371 U.S. at 422, 433-36. In Primus, the Court again recognized the Legal Defense Fund by name in holding that the First Amendment protects the speech and conduct of such attorneys in advising people of their civil rights and engaging in litigation to vindicate those rights. 436 U.S. at 429. These freedoms may not be limited except upon a showing that there is "'a subordinating interest which is compelling' ... and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms.'" Id. at 432 (citations omitted). Since the constitu-

tionally required showing was never made in this case, the Fifth Circuit's decision is consistent with Button and Primus.

Contrary to petitioners' contention, the decision below does not conflict with the decision in Weight Watchers of Philadelphia, Inc. v. Weight Watchers International Inc., 455 F.2d 770 (2d Cir. 1972). In Weight Watchers the Second Circuit held that, where an order permits a defendant to communicate with corporate class members in franchise litigation while adequately safeguarding the rights of those class members,[12/] it is not an appealable order, id. at 772-75, and it is not subject to review on a petition for mandamus, id. at 775. The Seventh Circuit has also noted that, in appropriate circumstances, a district court may permit the communication of a settlement offer by a defendant to members of a plaintiff's

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12/ The order provided that counsel for the class members were to be present at each negotiating session and were to review any new contract provisions; that plaintiff's counsel were to receive advance notice of any negotiations and be afforded a full opportunity to express their views concerning the action; and that the last negotiating session with each class member prior to execution of a contract was to be held at a location convenient to plaintiff's counsel. 455 F.2d at 772.

class. In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1137-41 (7th Cir.), cert. denied sub nom General Motors Corp. v. Oswald, 444 U.S. 870 (1979). But no decision of any circuit conflicts with the Third Circuit's decisions in Rodgers and Coles, or with the Fifth Circuit's decision in the case at bar, that local rules and orders are invalid when they restrain communications by plaintiffs and their counsel with class members in civil rights cases.[13/]

Although there is no conflict in the circuits on this issue, petitioners have correctly noted that the en banc decsion of the Fifth Circuit not only conflicts with but expressly rejects the recommendations of § 1.41 of the 1973 and 1977 editions of the Manual for Complex Litigation.[14/]

13/ This question was presented but not decided in Lewis v. Bloomsburg Mills, Inc., 608 F.2d 971 (4th Cir. 1979). There the court held that an order restraining communications by plaintiffs and their counsel with class members in an employment discrimination case was not an appealable order and was not subject to review by mandamus.

14/ The 1977 edition of the Manual appears in 1 Pt. 2 Moore's Federal Practice (2d ed. 1980) and in Wright & Miller, Manual for Complex Litigation (1977).

However, the Manual is currently undergoing revision. In a recently issued tentative draft,[15] the Manual's board of editors has made substantial changes in § 1.41. For instance, all recommendations that communications with actual or potential class members be restricted by local rule have been deleted from § 1.41 (tentative draft, pp. 67-76), and Suggested Local Rule No. 7 has been removed from the Manual's appendix (id. at 504-10). While the tentative draft continues to recommend that district courts enter orders restraining communications without requiring any showing of an actual or threatened abuse (id. at 70-71, 75-76),[16] this recommendation was made without the benefit of the Fifth Circuit's en banc

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15/ Manual for Complex Litigation, Tentative Draft of the Fifth Revision, with Amendments to Feb. 4, 1980 (issued by the Federal Judicial Center, June 24, 1980).

16/ But cf. id. at 69 (orders restraining communications should be entered "when necessary or desirable").

decision in the case at bar.[17/]

The final draft of the Manual, which has not yet been issued, may well make still more changes in the recommendations concerning communications in class actions. The Court should not grant the petition in this case on the basis of an asserted conflict that may no longer exist when the revision of the Manual has been completed.

17/ In support of this recommendation, the tentative draft cites the decision of the panel majority which was overturned by the en banc court. See id. at 76, 332 n.42c.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 80-441

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OCTOBER TERM 1980

GULF OIL COMPANY, ET AL.,
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v.

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR THE PETITIONERS

QUESTION PRESENTED FOR REVIEW

Whether during the pendency of a class action, a United States district court can constitutionally enter an order limiting certain communications between plaintiffs or their attorneys and potential or actual class members not yet formal parties to the action, in order to prevent actual and potential abuses of the class action device?

PARTIES BELOW

The following is a listing of all parties to this proceeding, as required by United States Supreme Court Rule 34.1(b):

1. Subsidiaries and Affiliates of Petitioner Gulf Oil Company:*

Afran Bahamas Limited Marine Dept.; Alberta Products Pipe Line Ltd.; Allied-General Nuclear Services; American Heavy Lift Shipping Company; Asia Polymer Corporation; A/S Jargul; A/S Jargul and Co. K/S; Australian Gulf Oil Company; Balinesian Gulf Oil Ltd.; Britama Tankers Limited; Cabinda Gulf Oil Company; China Gulf Plastics Corporation; Canada Systems Group (EST) Limited; Carboquimica, S. A. Ltd.; China Gulf Oil Company, Ltd.; China Gulf Plastics Corporation; Colonial Pipeline Company; Compania Petrolera Aquarico, S.A.; Compagnie D'Investments Pour Les Combustibles De Reacteurs a Haute Temp; Coser, S.A.; Eastern Gulf Oil Company, Ltd.; Eastern Venezuela Gas Transport Company; Ethylene Pijpleiding Maatschappij (Belgium) S.A.; Ethylene Pijpleiding Maatschappij (Nederland) B.V.; Explorer Pipeline Company; Gaelic Oil Co. Ltd.; G & C Realty Limited; General Atomic Company; General Atomic Europe-G.m.b.H.-Zurich; Gulf Canada, Ltd.; Gulf-Dravo Systems Corporation; Gulf Ecuatoriana de Petroleo, S.A.; Gulf Italia Production Co. S.p.A.; Gulf Italiana SpA; Gulf Oil A/S; Gulf Oil (Belgium) S.A.; Gulf Oil Chemicals Company Asia Limited; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Company (Portugal) Limited; Gulf Oil Company South Asia; Gulf Oil Egypt, Ltd.; Gulf Oil (Great Britain) Ltd.; Gulf Oil (Ireland) Ltd.; Gulf Oil (Luxembourg) S.A.; Gulf Oil Pakistan Ltd.; Gulf Oil Refining Ltd.; Gulf Oil Sales, Inc.; Gulf

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* In accordance with United States Supreme Court Rule 28.1, this listing omits wholly-owned subsidiaries which were included in the list of parties submitted in the Petition for writ of certiorari.

Oil (Switzerland); Gulf Oil Trading GmbH; Gulf Oil Trading Investments Limited; Gulf Oil Zaire S.a.R.L.; Gulf Oman Petroleum Ltd.; Gulf-Preload Structures Inc.; Gulf Supply and Distribution Co. Ltd.; Gulf (U.K.) Offshore Investments Limited; Harshaw Cabo & Cia, S.A.; Harshaw Chemie S.a.R.L.; Harshaw Galvanotechnia S.A.; Harshaw Quimics Ltda.; Hochtemperature Reaktorbau G.m.b.H.; Hutchinson Island Limited Partnership; Ico Pintures, S.A.; Industrial Vencedor S.A.; Interquimics S.A.; INSCO Holding and Finance Company N.V.; INSCO Limited; Java Gulf Ltd.; Keydril Ltd.; Keydril (Nigeria) Ltd.; Key International Drilling Co. Limited; Key Perfuracoes Maritimas, Ltd.; Korea Oil Corporation; Kupan Emirates Company Ltd.; Kupan Financial Company (Rotterdam) B.V.-Minerals Branch; Kuwait Oil Company Limited; Laurel Pipe Line Company; London Oil Refining Company Limited; Mid-Atlantic Chemical Corp. S.A.; Midcaribbean Investments Ltd.; Midwest Carbide Corporation; Millmaster Onyx (Canada) Ltd.; Millmaster Onyx G.m.b.H; Montreal Pipe Line Company Limited; Mozambique Gulf Oil Company; Okinawa Sekiyu Company, Ltd.; Okinawa Terminals Co., Ltd.; Oklahoma Nitrogen Company; Panindustrial, S.A.; Peace Pipe Line, Ltd.; Pembroke Cracking Company; Permaping, S.A.; Petroleo Gulf de Brazil Limitada; Petroleos Gulf de Guatemala, S.A.; Plaschem International Company (Hong Kong) Ltd.; Plastigama, S.A.; Productos Quimicos Somox, Ltda.; Project Baltic; Propet Company Ltd.; Raffinerie de Cressier S.A.; Rimbey Pipe Line Co., Limited; Rio Blanco Oil Shale Partnership; Sarni S.p.A.; Silvertown Lubricants Limited; Sociedad Anonima Espanola de Lubrificantes; Societe de Combustible Pour Reacteurs a Haute Temp.; South Pacific Gulf Oil Company; Spanish Gulf Oil Company; Spencer Quimica Mexicana S.A. de C.V.; Sultron Ltd.; Sulzer General Atomic Waermetauscher; Taita Chemical Corporation; Trans Northern Pipe Line Company; Venezuela Gulf Refining Company; West Texas Gulf Pipe Line Company; Western G.M.C. Pontiac Buick Ltd.

2. The Petitioner Unions are:

Oil, Chemical and Atomic Workers International Union, and Local Union No. 4-23 and Oil, Chemical and Atomic Workers International Union, defendants.

The International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers, Local Union No. 390; International Brotherhood of Electrical Workers, AFL-CIO; United Transportation Local Union; International United Transportation Union; Bricklayers, Masons, and Plasterers International Union, Local 13; and International Bricklayers, Masons, and Plasterers Union were prospective defendants named in plaintiffs' (now Respondents') motion to join additional defendants and for leave to amend the complaint. This motion was pending when the district court granted summary judgment for the existing defendants (now Petitioners).

3. Respondents are:

Wesley P. Bernard; Elton Hayes, Sr.; Rodney Tizeno; Hence Brown, Jr.; Willie Whitley and Willie Johnson; the proposed class of all black employees now employed or formerly employed by defendant, Gulf Oil Company, in Port Arthur, Texas, and all black applicants for employment at Gulf Oil Company who have been rejected for employment at the company.

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No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc* (J.A. 231) is reported at 619 F.2d 459. The order of the court of appeals granting a rehearing *en banc* (J.A. 229) is reported at 604 F.2d 449. The vacated panel opinion of the court of appeals, of which parts I, II, and III are adopted by the *en banc* opinion (J.A. 175) is

reported at 596 F.2d 1249. The order of the district court granting Defendants' Motion for Summary Judgment (J.A. 170) is not reported.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on June 19, 1980. The Petition for Writ of Certiorari was filed on September 17, 1980, and was granted on December 8, 1980. (J.A. 279). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The first amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

Fed. R. Civ. P. 23(d) provides:

> (d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene

and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

STATEMENT OF THE CASE

This class action was commenced on May 18, 1976, against Petitioners Gulf Oil Company and the unions[1] by six present or retired black employees of Gulf's Port Arthur, Texas refinery. (R. 1). The suit alleged that Petitioners had engaged in racial discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. (J.A. 11). The Respondents sought to represent a class of all black employees presently and formerly employed at the Port Arthur refinery, and all black applicants who had been rejected for employment at any Gulf facility, without regard to temporal or geographic limits. (J.A. 12).

In 1967, three of the Respondents had filed charges of discrimination against Petitioners with the Equal Employment Opportunity Commission (EEOC) for which the EEOC found reasonable cause on August 15, 1967. (R. 212, 228, 231, 234, 238). At the same time the individual charges of discrimination were pending, concilia-

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1. The union Petitioners are the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 and the Oil, Chemical and Atomic Workers International Union.

tion discussions were being conducted between Gulf, the EEOC, and the Office for Equal Opportunity, United States Department of Interior (OEO) (J.A. 73, 78) pursuant to a charge of discrimination filed by a Commissioner of the EEOC in 1968. (J.A. 54). These negotiations between Gulf, the EEOC, and the OEO regarding the Commissioner's charge took place over a period of several years (J.A. 73, 78) and resulted in a conciliation agreement between the EEOC, the OEO, and Gulf on April 14, 1976. (J.A. 26). The agreement established "goals and timetables" for specific affirmative action relief (J.A. 32-38), as well as providing an award of over $900,000 to 616 present and former black employees, and 29 female employees at Gulf's Port Arthur refinery. (J.A. 28, 48). In sworn affidavits the District Director of the EEOC and the Western Regional Manager of the OEO stated the conciliation agreement was a fair and reasonable settlement of all pending charges of discrimination. (J.A. 75, 78).

After the conciliation agreement was finalized, Gulf, pursuant to terms of the agreement, mailed a letter and release, the form of which was approved by the federal agencies, notifying all employees covered by the conciliation agreement that they were entitled to an award of back pay, and that upon execution of the general release, the employees would receive the back pay award. (J.A. 31, 74). At the time this action was filed, approximately 431 black employees out of a total of 616 black employees entitled to a back pay award had executed the receipt and general release, and had received their back pay checks. (J.A. 74). On May 25, 1976, after being served with the complaint, (R. 11) Gulf voluntarily ceased further distribution of the back pay awards and ceased

all contacts with potential class members concerning the conciliation agreement. (J.A. 43, 74, 75).

On May 22, 1976, four days after this action was filed, attorneys for Respondents attended a meeting of actual and potential class members (J.A. 115, 118), and according to affidavits filed in this case, discussed with the potential class members the issues involved in this action, answered questions from the audience, and explained the administrative and legal problems inherent in fair employment litigation. (J.A. 115, 116, 118).

After the meeting, Gulf's counsel, by emergency motion, represented to the district court that it had learned that an attorney for Respondents advised the participants at the meeting to mail back the checks they had received from Gulf, since by prosecuting the present action Respondents' attorney could recover at least double the amount which was paid under the conciliation agreement. (J.A. 22, 23, 24). Gulf's emergency motion sought an interim order limiting communications between potential class members and all parties and their counsel to this lawsuit. (J.A. 21, 25). On May 28, 1976, District Judge Steger, ruling in Chief Judge Fisher's absence, granted Gulf's motion and entered the interim order. (J.A. 44).

Judge Steger's interim order required Gulf to file another motion upon Judge Fisher's return. (J.A. 45). Gulf filed a motion to modify Judge Steger's interim order limiting communications on June 8, 1976. (J.A. 46). After submission of briefs accompanied by five affidavits (J.A. 71, 76, 111, 115, 118) and after a hearing (J.A. 1, 3), Judge Fisher entered a modified order (J.A. 124) which allowed constitutionally protected communications. (J.A. 125). The modified order was adopted almost verbatim

from "Sample Pre-trial Order No. 15—Prevention of Potential Abuses of Class Actions" contained in the *Manual for Complex Litigation*, 1 (Pt. 2) J. Moore, Federal Practice Pt. II, § 1.41 (2d ed. 1980). (J.A. 97). Also, the order allowed a resumption of the conciliation process under the court's supervision. (J.A. 125-129).

On July 6, 1976, Respondents and their attorneys moved for permission to communicate with members of the proposed class (J.A. 130), tendering to the court the substance of the communication in the form of a leaflet. (J.A. 132). This motion was denied by the court on August 10, 1976. (J.A. 157).

After the district court granted summary judgment for the defendants on January 11, 1977, (J.A. 170), Respondents appealed to the United States Court of Appeals for the Fifth Circuit. (R. 392). On June 15, 1979, a panel of the court reversed the judgment of the district court and remanded for further proceedings. (J.A. 175). The panel held that neither the statute of limitations nor the equitable doctrine of laches barred Respondents' claims. However, the panel did uphold the order limiting communications with members of the putative class as a permissible exercise of the district court's discretionary authority to control class actions under Rule 23(d) of the Federal Rules of Civil Procedure. Upon hearing *en banc,* the Fifth Circuit adopted all parts of the panel decision, but reversed the panel's approval of the order affecting communications, holding it was unconstitutional. (J.A. 231).

This Court granted the writ of certiorari on December 8, 1980, expressly limiting review to the district court's

order respecting communications with potential class members.[2] (J.A. 279).

SUMMARY OF ARGUMENT

I.

ENTRY OF THE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S AUTHORITY UNDER RULE 23

A. Class actions are a special kind of litigation where the court must protect the interests of absent class members.

This case raises substantial and important questions concerning the district court's authority under Fed. R. Civ. P. 23 to manage a class action case and to provide for the protection of absent class members. In this case, the Court has limited its review to a class action procedural issue which will require the Court to balance the needs of the district court to manage class actions against the needs of Respondents and their attorneys to communicate with potential members of a proposed class, absent court supervision.

Class actions are a special kind of litigation where the district court is required to protect the interests of absent class members while actively managing class proceedings. Rule 23(d) provides the district court, as guardian of absentees' rights, with broad authority to fashion appropriate orders to prevent abuses of the class action device.

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2. The petition for writ of certiorari also raised the issues of laches and statute of limitations.

B. An order monitoring communications will insure protection of absent class members.

This Court has ruled that in class action cases it is the primary responsibility of the district court to monitor the actions of the parties before it. The most widely accepted order for fairly and equitably monitoring the activity of parties and their attorneys is that proposed by the Board of Editors of the Federal Judicial Center.

The *Manual's* order, while designed to control some communications, freely allows: 1) constitutionally protected communications with absent class members; 2) all communications approved by the court; 3) communications between an attorney and his client, or a prospective client, who has on the initiative of the client or prospective client consulted with, employed, or proposed to employ the attorney; or 4) communications occurring in the regular course of business or in the performance of the duties of a public office or agency . . . which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

The order recommended in the *Manual* is the product of the combined experience of the judges comprising the Board of Editors, who recognized the impossibility of drafting an order which would cover every potential abuse. Consequently, the *Manual's* order is drawn as narrowly as possible to accomplish its intended purposes and represents the best possible monitoring device available to protect absent class members from misrepresentations during class action litigation.

C. The monitoring order entered here is appropriate.

The *Manual's* order was entered in this case only after the district court reviewed a complete record showing the threat of actual abuse to the class action process. The threatened abuses in this case occurred during the pre-class certification stage—the recognized stress point in this special litigation. More importantly, the threatened abuses occurred at a time when the rights of unrepresented absentees were particularly exposed to misrepresentations —during an ongoing conciliation process when absent class members were making important choices concerning their rights. As a result of the threatened abuses, the district court was required to enter a monitoring order to assure effective management of the proposed class and to protect the rights of the potential class members who had already begun to feel the pressures of competing interests for their favor.

II.

THE ORDER OF THE DISTRICT COURT MONITORING COMMUNICATIONS WITH POTENTIAL CLASS MEMBERS IS CONSTITUTIONAL

A. First amendment values must be reconciled with the court's duty to protect the fair and efficient administration of justice.

This Court has often been required to reconcile first amendment rights with other important constitutional interests. When the countervailing value to be reconciled has been the maintenance of a judicial system responsive to the needs of a free society, and to the protection of

the fair and efficient administration of justice, this Court and other American tribunals have traditionally regarded that value to be very important. Here, the competing values are: 1) the court's authority to enter an order, recommended by some of the nation's most experienced jurists and designed to protect against specific abuses during the administration of a unique judicial process; and 2) the generalized first amendment concerns of parties and their counsel, who have submitted to the court's jurisdiction.

The object of the order entered here was to permit the district court to manage this litigation at a particular stress point and to ensure that misleading information did not pass from parties and their attorneys to others directly affected by the litigation, who depend upon the district court for their protection. This Court has recognized there is an important governmental need in preventing misleading speech in the commercial area. In this case, the need to prevent misleading speech is at least as important when the communication originates, in a very real sense, in the district court itself, particularly when those desiring to communicate are, at least to some degree, doing so as officers of the court. The district court had a legitimate constitutionally based concern in ensuring that this class action was conducted in a manner which not only avoided injustice but the appearance of injustice.

B. The order is not a prior restraint.

When reconciling competing constitutional values this Court has required a careful analysis of the various interests involved. The result of this analysis here is that the order did not constitute a prior restraint since it contained a broad "exception" allowing free exercise of

speech without prior court approval. This "exception" allows any court imposed prohibition on speech to be constitutionally challenged by the one charged with violation of the order and for that reason the inquiry into the order's validity cannot proceed on the basis of its assumed constitutional infirmity as a prior restraint.

C. The facts in this case support entry of the order based upon previously articulated standards.

Several standards have been articulated by which to judge the constitutionality of the present order. The Board of Editors of the *Manual* have taken the position that the very nature of the unique class action device creates sufficient justification for entry of the order. Some courts have required a showing of "reasonable probability" of prejudice to the fair administration of justice, while other courts have required a showing of "serious and imminent" danger before entering the order. The facts in this case established threats of abuse to the class action device sufficient to justify entry of the order based upon any of the standards articulated.

The very nature and intensity of the competing forces which occurred at the unusually delicate stage of this litigation demanded entry of the order. These forces, in fact, threatened the rights of absent parties and challenged the class management ability of the district court. As guardian of the absentees' rights and as administrator of the unique class action process, the district court fulfilled its duty to actively monitor the actions of the parties—a duty imposed by the decisions of this Court.

ARGUMENT

INTRODUCTION

This case raises substantial and important questions concerning the administration of class actions in the federal courts and the power of district courts to prevent actual and potential abuses of the class action device under Rule 23 of the Federal Rules of Civil Procedure. In this case, the Court has limited its review to a class action procedural issue which will require the Court to balance the needs of the district court to manage the class action against the needs of Respondents and their attorneys to communicate with potential members of a proposed class, absent court approval.

The issues raised here have not yet been passed upon by this Court. In this case, the United States Court of Appeals for the Fifth Circuit invalidated a district court's order which provided for minimal court supervision of communications with potential class members. The district court entered the order only after compiling a complete record showing the class action device was threatened by abuse.

Since the district court's order was based directly upon the proposed order recommended by the *Manual for Complex Litigation*,[1] the Fifth Circuit's opinion places a constitutional cloud on the work of the Board of Editors of the Federal Judicial Center. Moreover, since the

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1. *Manuel for Complex Litigation, reprinted in* 1 (Pt. 2) J. MOORE FEDERAL PRACTICE Pt. II, § 1.41 (2d ed. 1980) [hereinafter cited as *Manual*]. The *Manual* also recommends adoption by the district courts of a local rule regarding communications with absent class members. *See* n.7, p. 17, *infra*.

Manual's suggested rule and order have been adopted by numerous district courts across the nation, the Fifth Circuit's decision has implications and importance which reach far beyond the facts of this case.[2] Furthermore, the language of the Fifth Circuit's opinion is in conflict with a decision of the United States Court of Appeals for the Second Circuit in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972).

The order has been challenged on both constitutional and statutory grounds. Since this Court will not decide constitutional issues where a nonconstitutional ground will be dispositive, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 271-72 (1977); *Hagans v. Lavine*, 415 U.S. 528, 547 n.12, 549 (1974), this brief will first discuss the appropriateness of the district court's order under Rule 23, and then discuss the constitutionality of that order.[3]

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2. The *Manual's* Suggested Local Rule No. 7 has been adopted by: S.D. Fla. R. 19B; N.D. Fla. R. 17B; N.D. Ill. (Civ.) R. 22; E.D. La. R. 2.12; D. Md. R. 20; S.D. Ohio R. 3.9.4; W.D. Pa. R. 34; N.D. Tx. (unpublished); S.D. Tx. R. 6; W.D. Wash. (Civ.) R. 23(g); N.D. Ga. R. 221.2 and 221.3; M.D.N.C. R. 17(b)(6). Based upon the Fifth Circuit's *en banc* decision in *Bernard* the following courts have withdrawn their local rule: S.D. Tx. R. 6; N.D. Fla. R. 17B; N.D. Ill. R. 22.

3. This Court followed a similar method of analysis in *United States v. Nixon*, 418 U.S. 683 (1974), when it discussed the requirements of Fed. R. Crim. P. 17(c) before considering the constitutional questions.

I.

ENTRY OF THE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S AUTHORITY UNDER RULE 23

A. Class actions are a special kind of litigation where the court must protect the interests of absent class members.

This Court has recognized "[t]here are special rules relating to class actions and, to that extent, they are a special kind of litigation." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978). Many of the special rules governing this unique litigation are contained expressly in Rule 23 and relate to the district court's authority to manage the class action. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). Thus, under Rule 23(d) the district court is granted broad authority to enter appropriate orders:

> . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . . (3) imposing conditions on the representative parties . . . (5) dealing with similar procedural matters.

Fed. R. Civ. P. 23(d).[4]

Recently, this Court said it was obvious "[t]hat there is a potential for misuse of the class action mechanisms.

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4. The district court is required to manage the settlement of class action cases since Fed. R. Civ. P. 23(e) provides that a class action will not be dismissed or compromised without the approval of the court and notice to members of the class in such a manner as the court decides.

. . ." *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper,* 445 U.S. 326, 339 (1980). A review of the case law indicates that the "potential for misuse" has often matured into actual abuse of the class action device resulting in harmful effects on the rights of potential class members.[5]

The class management provisions of Rule 23(d) provide the court with "wide discretion" to create "several methods of safeguarding the interests of absent class members," 3B J. Moore Federal Practice ¶ 23.70, at 23-479, 23-480 (2d ed. 1980), and are applicable to cases, such as this one, brought under Fed. R. Civ. P. 23(b)(2). *Sperry Rand Corp. v. Larson,* 554 F.2d 868 (8th Cir. 1977); *Sanders v. John Nuveen & Co.,* 463 F.2d 1075

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5. These abuses include: calling meetings of actual or potential class members and making misrepresentations, *Reed v. Sisters of Charity of the Incarnate Word of Louisiana, Inc.,* 25 Fed. R. Serv. 2d 331 (W.D. La. 1978); *N.O.W. v. Minnesota Mining and Manufacturing Co.,* 18 Fair Empl. Prac. Cas. 1176 (D. Minn. 1977), *appeal dismissed,* 578 F.2d 1384 (8th Cir. 1978); efforts to seek out people willing to have a class action instituted in their names as representatives of a class, *Carlisle v. LTV Electrosystems, Inc.,* 54 F.R.D. 237 (N.D. Tex. 1972); informal efforts to secure affidavits from members of the class which plaintiffs purported to represent, denying that the plaintiffs represented the affiants, *Northern Acceptance Trust 1065 v. AMFAC, Inc.,* 51 F.R.D. 487 (D. Hawaii 1971); placing unauthorized newspaper advertisements which had an adverse effect on parties, *EEOC v. Red Arrow Corp.,* 8 Fair Empl. Prac. Cas. 621 (E.D. Mo. 1974); seeking to dismiss a class action allegation upon plaintiff's individual compromise, *Rothman v. Gould,* 52 F.R.D. 494 (S.D. N.Y. 1971); conditioning franchise renewal on release of class claims, *Hawkins v. Holiday Inns, Inc.,* [1978-1] Trade Cases ¶ 61,838 (W.D. Tenn. 1978); misleading an emergency judge into striking class allegations which resulted in possible prejudice to the rights of proposed class members, *Yaffe v. Detroit Steel Corp.,* 50 F.R.D. 481 (N.D. Ill. 1970); attempting solicitation of potential class members after denial of class motion, *Weisman v. Darneille,* 78 F.R.D. 671 (S.D. N.Y. 1978).

(7th Cir.), *cert. denied,* 490 U.S. 1009 (1972); *Cranston v. Freeman,* 290 F.Supp. 785 (D.N.Y. 1968), *rev'd on other grounds sub nom. Cranston v. Hardin,* 428 F.2d 822 (2d Cir. 1970), *cert. denied,* 401 U.S. 949 (1971).[6] Under the provisions of Rule 23(d), the district court must actively protect absent class members since "[t]he judge is no longer [to be] a passive observer, allowing the initiative of the opposing attorneys to control the course of the litigation; he plays an active role. In a very real sense, he is the guardian of the interests of absentees." Comment, *Adequate Representation, Notice and the New Class Actions Rule: Effectuating Remedies Provided by the Securities Law,* 116 U. Pa. L. Rev. 889, 898 (1968), *quoted in* 3B J. Moore, *supra,* ¶ 23.70 at 23-480. In addition, the court's direct participation is required in class proceedings since it is "manager of the case." *In re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006, 1012 n.8 (5th Cir. 1977); *see also Huff v. N. D. Cass Co.,* 485 F.2d 710, 713 (5th Cir. 1973).

Thus, under Rule 23(d)(1)-(4) the court, as manager of the litigation, is required to enter appropriate orders for the protection of absent class members. The scope of these orders is "limited only by the use of sound judicial discretion," 3B J. Moore, *supra,* ¶ 23.75 at 23-492, and may be framed under Rule 23(d)(5) to correct procedural matters which may adversely affect the rights of absent class members. Consequently, when the rights of absentees are left unprotected by the class action mechanism, the district court, as manager of the class, is required to frame appropriate orders to protect those rights.

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6. Class action claims under Title VII are Fed.R.Civ.P. 23(b)(2) actions. *See Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969); *Jenkins v. United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968).

B. An order monitoring communications will insure protection of absent class members.

Just last term this Court ruled it is a primary "responsibilit[y] of a district court to protect both the absent class and the integrity of the judicial process by monitoring the action of the parties before it." *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper, supra,* at 331. To meet this responsibility, Rule 23(d) authorizes the district court to enter an order protecting absent class members by monitoring information flowing to them. 3B J. Moore, *supra,* ¶ 23.75, at 23-499. The most widely accepted order for fairly and equitably monitoring the activity of class parties is that proposed by the Board of Editors of the Federal Judicial Center.[7] *See Manual, supra,* at 225-228 for a text of the suggested order.[8]

The *Manual's* order while designed to control some communications freely allows: (1) constitutionally protected communications with absent class members; (2) all communications approved by the court; (3) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (4) communications occurring

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7. The judges comprising the Board, after many years of judicial experience with class actions, were especially attuned to the abuse, both intentional and inadvertent, inherent in the class action device. To avoid the potential for abuse and to guard against unapproved conduct of the attorneys or parties, the *Manual* recommended adoption by the district courts of a local rule. *See Manual, supra,* at 32.

8. The recommendations of the *Manual,* although not obligatory upon the courts, are important since "[t]he *Manual* is a collection of suggested procedures for the handling of complex cases written by judges for judges after receiving the widest possible range of suggestions and criticisms from the Bench and Bar." *Manual, supra,* at xxvi.

in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein. *Id.*

The order is the product of the combined experience of the judges comprising the Board of Editors, who recognized the impossibility of drafting an order which would cover every potential abuse.[9] Consequently, the *Manual's* order is drawn as narrowly as possible to accomplish its intended purposes and represents the best possible monitoring device available to protect absent class members from misrepresentations during class action litigation.[10] The *Manual* recommends that the district court not wait until actual abuses occur, but act promptly to prevent potential abuses by entry of the order in all class actions. *Id.* at 226.[11]

Protection of absent class member's rights prior to class certification is particularly important and demands

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9. The district court should not be required to match specific abuses with specific regulatory rules, *see Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782, 791 (E.D. La. 1977), since any attempt at prohibiting by itemizing each potential abuse would succumb to the ingenuity of those determined to wrongfully take advantage of the class action procedure. *See Manual, supra,* p. 3 (Cumm. Supp. 1980-81).

10. One of the primary purposes of the *Manual's* order is "to prevent misrepresentations of the status, purposes, and effects of the action." *Lupia v. Stella D'Oro Biscuit Co.*, [1974-1] Trade Cases ¶ 75,046 (N.D. Ill. 1972), *appeal dismissed,* (7th Cir. 1973), *cert. denied,* 417 U.S. 930 (1974).

11. "Further experience continues to teach that it is dangerous to await the occurrence of an abuse before trying to correct it. . . ." *Manual, supra,* p. 3 (Cumm. Supp. 1980-81).

the special attention of the trial judge. It is at this stage that the rights of absent class members are acutely exposed to the effects of false or misleading information; a time when they are unrepresented by counsel. *See Winfield v. St. Joe Paper Co.*, 20 Fair Empl. Prac. Cas. 1093 (N.D. Fla. 1977).[12]

The ability to control misleading statements at the pre-certification stage takes on an even greater significance, as in this case, where potential class members were considering accepting a back pay offer in a conciliation agreement making them ineligible for inclusion in the class. Misrepresentations received by this group during their deliberations could have had irreparable consequences.[13]

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12. In the class action context, it appears that the attorney-client relationship between counsel for the namd plaintiffs and purported class members is created when the court certifies the class and designates the class representative and his counsel. *Rental Car of New Hampshire, Inc. v. Westinghouse Electric Corp.*, 496 F. Supp. 373, 383 (D. Mass. 1980); *Amos v. Board of School Directors of the City of Milwaukee*, 408 F. Supp. 765, 774 (E.D. Wis. 1976), *aff'd sub nom. Armstrong v. Brennen*, 359 F.2d 625 (7th Cir. 1976), *vacated*, 433 U.S. 627 (1977). "The relationship between the representative parties and their lawyer or lawyers is one of private contract; the relationship between the class counsel and the members of the class, apart from the representative parties, is one of court creation." *Id.*, at 775. The mere filing of a class action lawsuit does not mean that counsel for the named plaintiffs is counsel for the class; rather that relationship is a matter of judicial determination at the class certification stage. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). Until the court designates an attorney as counsel for the class upon class certification, the absent class members are not represented by counsel and must look to the court to be the "guardian" of their rights. *See Smith v. Josten's American Yearbook*, 78 F.R.D. 154, 168 (D. Kan. 1978), *aff'd*, 624 F.2d 125 (10th Cir. 1980). In this case there was no attorney-client relationship between counsel for the named plaintiffs and the proposed class because no class had been certified.

13. "When those communications are sent during the limited period in which class members may opt out of the class, or as here,

The dangers inherent in exposing absent class members to misrepresentations were explained in *N.O.W. v. Minnesota Mining and Manufacturing Co., supra,* at 1178-1179:

> . . . [T]he court is convinced that it retains a compelling interest in prohibiting unapproved communications to class members if those communications were to misrepresent the status or effect of the case presently before the court. Such misrepresentations would have an obvious potential for creating confusion and for adversely affecting the administration of justice. If such communications were to be cloaked with an air of governmental authority, the potential for confusion would be increased, and there would arise not only the risk of subsequent disenchantment with the judicial process, but also the danger that individuals would be induced to act to their detriment in reliance upon such misinformation.

Thus, the authority of the district court to manage the class must be maintained to prevent misrepresentations during the pre-class certification stage of the litigation.

If the *Manual's* suggested order is ignored and unsupervised communications with potential class members are allowed, parties and their attorneys will be able to send out notices inconsistent with those from the court, thereby usurping the exclusive authority of the trial court to issue or approve notices to the class:

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in which they may accept a back pay offer pursuant to a conciliation agreement, any misleading statement may be irreparable." *Bernard v. Gulf Oil Co.,* 596 F.2d 1249, 1260 (5th Cir. 1979), *rev'd in part,* 619 F.2d 459 (5th Cir. 1980) (*en banc*).

> There is no provision in the Federal Rules for counsels for a party, sua sponte, to notify class members or non-class members, formally or informally, of the pendency of a lawsuit. In an action such as this one arising under subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, notice to class members is governed by the provisions of Rule 23 (d)(2). Rule 23(d)(2) vests the court with the sole discretionary authority to issue notice. As Rule 23 (d)(2) states, the discretionary notice is for the purpose of assuring fair conduct of an action or protecting class members—it is not for undesirable solicitation of claims. (Citations omitted.)

Lewis v. Bloomsburg Mills, Inc., 21 Fed. R. Serv. 2d 748, 750 (D.S.C. 1976). *See also Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980); *Weisman v. Darneille, supra,* at 674.

If a monitoring order is not entered, the district court cannot effectively control parties or their attorneys from sending unauthorized notices to absent class members. This problem was demonstrated in *Erhardt v. Prudential Group Inc., supra,* where the Second Circuit held that the offending party was not guilty of contempt since no order was entered limiting communications.[14] So that the clear objectives of Rule 23(d) are not frustrated, the authority of the trial court to monitor communications should be upheld.[15]

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14. The Second Circuit recommended that an order be entered limiting communications at the time the district court sends notices to class members. *Erhardt v. Prudential Group, supra,* at 846.

15. If after the monitoring order is entered, the court fails to allow critical communications to reach absent class members, the appellate courts can correct the error upon final appeal. *See Oswald v. McGarr,* 620 F.2d 1190 (7th Cir. 1980), where the court held such orders were non-appealable interlocutory orders and "any abuse of discretion may be corrected after final judgment. . . ."

C. The monitoring order entered here is appropriate.

Although the *Manual* was used by the district court in framing the present order, this case does not involve the unsupported application of the *Manual's* recommendations. In this case, the district court acted only after compiling a complete record showing the class action process was threatened by abuse.[16]

The threatened abuses in this case took place during the pre-class certification stage; the recognized stress point in this special kind of litigation. More importantly, the threatened abuses occurred at a time when the rights of unrepresented absentees were particularly exposed to misrepresentations; during an ongoing conciliation process when absent class members were making important choices concerning their rights.

In this case the facts supporting entry of the order were established in affidavits filed by the Respondents' attorneys. In these affidavits two attorneys admitted attending a meeting of potential class members called by the named plaintiffs and admitted discussing the issues

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Id. at 1195. *Accord, Weightwatchers of Philadelphia, Inc. v. Weightwatchers International, Inc., supra,* at 774. Apparently, the Fifth Circuit is in conflict with this approach, for it has granted writs of mandamus and dissolved orders limiting communications in two separate cases since deciding *Bernard, supra, (en banc). See In re Lilla Ann Norton,* 622 F.2d 917 (5th Cir. 1980); *In re Gilley,* 30 Fed. R. Serv. 2d 139 (5th Cir. 1980). This Court has rejected interlocutory appeals from orders granting or denying class status since "[t]he potential waste of judicial resources is plain." *Coopers & Lybrand v. Livesay, supra,* at 473.

16. This record included numerous briefs from the parties (J.A. 22, 47, 80, 92, 105), three affidavits from the Respondents' attorneys (J.A. 111, 115, 118), an affidavit from the EEOC (J.A. 71) and the OEO (J.A. 76), and a hearing on June 11, 1976 (J.A. 1, 3).

in the case, answering questions from the audience, and explaining the administrative and legal problems inherent in the litigation. (J.A. 115, 116, 118). Thus, the plaintiffs created and their attorneys participated in the type of activity which the *Manual's* recommended order was designed to control.[17] In addition to the statements acknowledged in affidavits, Gulf learned that Respondents' attorneys, during this meeting, also advised the potential class members not to sign conciliation releases and, if they had, to return the checks since they could recover double that amount through litigation. (J.A. 23, 24).[18]

Based upon these facts, the district court was required to enter the monitoring order to assure effective management of the class and to protect the rights of the potential class members who had already begun to feel the pressure of competing interests for their favor. Additionally, the order was required since numerous courts have recommended, indeed some have insisted upon, the trial court's supervision of individual settlement offers during a pend-

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17. *See, e.g., N.O.W. v. Minnesota Mining and Manufacturing Co., supra,* at 1179, where the court stated: "[I]t is the considered opinion of the court that any attempt to conduct and manage such litigation in the context of mass meetings conducted by attorneys for the parties for the purpose of discussing the status of this litigation would end in chaos."

18. This information was represented to the district court in Petitioner's Memorandum filed on May 27, 1976. (J.A. 22). Although attorneys for Respondents deny advising potential class members not to accept the offer under the conciliation agreement, counsel for Respondents make it clear in a Memorandum filed after the meeting with potential class members that they considered the relief afforded by the conciliation agreement to be inadequate. (J.A. 108, 109). The district court had the benefit of this memorandum as well as affidavits of Respondents' attorneys, Mr. Goldstein, Mr. Thibodeaux and Ms. Morrison (J.A. 111, 115, 118) prior to entering its order on June 22, 1976. (J.A. 124).

ing class action. *See In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1139-1140 (7th Cir.), *cert. denied,* 444 U.S. 870 (1979); *American Finance System, Inc. v. Harlow,* 65 F.R.D. 572, 576 (D. Md. 1974). Supervision was particularly critical in the present case "to exercise control over the communications of all parties to the suit so that undue influence [was] prevented." *Chrapliwy v. Uniroyal, Inc.,* 71 F.R.D. 461, 464 (N.D. Ind. 1976); Dole, *The Settlement of Class Actions for Damages,* 71 Colum. L. Rev. 971, 995-997 (1971); *Developments in the Law—Class Actions,* 89-B Harv. L. Rev. 1318, 1549-1550, 1601-1604 (1976).

By entering the order, the district court sought to achieve the objectives of Title VII (J.A. 126), which were articulated clearly by Justice Powell in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974):

> Cooperation and voluntary compliance were selected as the preferred means for achieving [the elimination of unlawful employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby State and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.[19]

As Justice Powell recognized, Congress charged the EEOC with meeting the objectives of Title VII. In this case, it was the EEOC (and OEO) who urged (together with

19. "[E]fforts should be made to resolve these employment rights by conciliation both before and after court action." *Dent v. St. Louis-San Francisco Railway,* 406 F.2d 399, 402 (5th Cir. 1969), *cert.*

Gulf) the resumption of the suspended conciliation efforts[20] in an affidavit (J.A. 71, 76) filed with Petitioner's memorandum. (J.A. 47).

After assuring itself that the conciliation agreement provided complete relief (J.A. 71-80), the district court granted the request to resume the conciliation process by establishing a detailed procedure under which judicial supervision of individual settlements would proceed fairly, equitably and without undue influence.[21]

When all the facts supporting entry of the order in this case[22] are weighed against the needs of Respondents and

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denied, 425 U.S. 944 (1971). *See also, United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-850 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

20. When served with the complaint, Gulf voluntarily suspended distribution of the back pay awards (J.A. 43, 74, 75) since many courts had held an action "must be assumed to be a class action" for purposes of dismissal or compromise under Rule 23(e) unless and until a contrary determination is made under 23(c)(1). *American Finance System, Inc. v. Harlow, supra,* quoting *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 326 (E.D. Pa. 1967).

21. The district court ordered the clerk of the court to issue a notice informing both current and former employees eligible for benefits under the conciliation agreement that they had an absolute right under Title VII to reject the terms of the conciliation agreement negotiated between the government and Gulf. (J.A. 104). *See United States v. Allegheny-Ludlum Industries, Inc., supra,* at 848 n.26. The court's notice made sure that these potential class members were fully apprised of the lawsuit, the conciliation agreement, and all relevant facts concerning their rights. (J.A. 103, 104). By allowing each potential class member entitled to relief under the conciliation agreement 45 days in which to make his decision, the court afforded them "ample opportunity to reflect and seek advice." *See Rodgers v. United States Steel Corp.*, 70 F.R.D. 639, 647 (W.D. Pa. 1976). This allowed each potential class member to knowingly and voluntarily decide whether or not to exercise his rights under Title VII. *See Alexander v. Gardner-Denver Co., supra,* at 52 n.15.

22. *See* n.16, p. 22, *infra.*

their attorneys for unsupervised communication with potential class members during the pre-certification stage of the litigation,[23] it is clear that the district court did not abuse its discretion.

II.

THE ORDER OF THE DISTRICT COURT MONITORING COMMUNICATIONS WITH POTENTIAL CLASS MEMBERS IS CONSTITUTIONAL

Having demonstrated that the monitoring order was an appropriate exercise of the district court's authority under Rule 23, the order will now be examined under the requirements of the first amendment.[24]

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23. While Respondents contend they needed to communicate with absentees to conduct discovery (J.A. 113, 116, 119), no such discovery under Fed. R. Civ. P. 26-37 was ever undertaken by them. The order did not prevent discovery, but rather it allowed "proper processing of the case," *Manual, supra,* at 34, and the order could have been "altered or amended" where justice so required. 3B J. Moore, *supra,* at 23-501. *See, e.g., N.O.W. v. Minnesota Mining and Manufacturing Co., supra,* at 1178 (order interpreted to allow witness interviews and free use of discovery rules 26-37); *Bottino v. McDonald's Corp.,* [1973-2] Trade Cases ¶ 74,810 (S.D. Fla. 1973) (local rule modified to allow discovery for preparation of position on class issues); *American Finance Systems, Inc. v. Harlow, supra,* (local rule held not prohibiting offers of individual settlements with court's supervision); *Norris v. Colonial Commercial Corp.,* 77 F.R.D. 672 (S.D. Ohio 1977) (order allowed solicitation of funds with court approval); *EEOC v. Singer Controls Co. of America,* 80 F.R.D. 76 (N.D. Ohio 1978) (order modified to allow communications likely to develop probative and relevant data).

24. When orders such as this have caused delay in judicial proceedings and resulted in confusion among the lower courts, "[i]t is all the more important, therefore, that this Court identify . . . the constitutional standard by which they are to judge . . . and the minimal procedure by which this standard is to be applied." *Gannett Co. v. DePasquale,* 443 U.S. 368, 398 (1979) (Powell, J., concurring).

A. First amendment values must be reconciled with the court's duty to protect the fair and efficient administration of justice.

There can be no doubt that first amendment concerns have a special place in our hierarchy of constitutional values. *Murdock v. Pennsylvania,* 319 U.S. 105, 115 (1943). Indeed, the constitutional value at issue here is ". . . the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut,* 302 U.S. 319, 327 (1937) (Cardozo, J.). But as this Court has regularly acknowledged, even first amendment rights must be reconciled with other important constitutional interests. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *Pell v. Procunier,* 417 U.S. 817, 822-828 (1974); *Konigsberg v. State Bar of California,* 366 U.S. 36, 49-51 (1961).

When the countervailing value to be reconciled has been the maintenance of a judicial system responsive to the needs of a free society, and to the protection of the fair and efficient administration of justice, this Court and other American tribunals have traditionally regarded that value to be most important.[25] While our political system is

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25. Thus, picketing may constitutionally be prohibited from areas around the courthouse, *see Cox v. Louisiana,* 379 U.S. 559 (1965); pre-trial communications by defendants may be limited, *United States v. Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969); the press may be required to respond to grand jury subpoenas and to answer questions, *Branzburg v. Hayes,* 408 U.S. 665 (1972); and the press may be denied access to pre-trial matters, *Gannett Co. v. DePasquale, supra.* Furthermore, this Court has suggested that orders be entered limiting pre-trial communications to protect the rights of parties, *Sheppard v. Maxwell,* 384 U.S. 333, 361 (1966); *Estes v. Texas,* 381 U.S. 532 (1965), noting that restrictions placed upon attorneys and parties are less drastic than those placed on the press. *Sheppard, supra,* at 359; *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 564 n.8 (1976); *id.* at 601, n.27, (Brennan, J., concurring).

based on the proposition that "the best test of truth" may be "the power of the thought to get itself accepted in the competition of the market . . . ," *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), our judicial system is based on the proposition that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado,* 205 U.S. 454, 462 (1907) (Holmes, J.).[26] Thus, in our system of justice, the inherent power of the court to protect the administration of justice is undisputed. *See Sheppard v. Maxwell, supra; Pennekamp v. Florida,* 328 U.S. 331, 347 (1946); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).[27] Rooted in common law tradition, *see Bridges v. California,* 314 U.S. 252, 260 (1941), this power undoubtedly comprehends protection of the court itself, as well as parties before it. *Pennekamp v. Florida, supra,* at 347; *Zarate v. Younglove,* 86 F.R.D. 80 (C.D. Cal. 1980).[28]

Therefore, the competing constitutional values here are: (1) the court's authority to enter an order recommended by the nation's most experienced jurists and designed to

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26. *See, e.g.,* 40 U.S.C. § 13j which prohibits "loud" or "threatening" language in the Supreme Court building or on its grounds.

27. This Court has adopted a rule limiting under certain circumstances communications of its law clerks to insure the proper administration of justice. Sup. Ct. R. 7, Prohibition Against Practice.

28. This power extends to control attorneys' behavior since it is recognized "that the primary responsibility for controlling the conduct of lawyers practicing before the district court lies with that court. . . ." *Gas-A-Tron of Arizona v. Union Oil Co. of California,* 534 F.2d 1322, 1325 (9th Cir.), *cert. denied,* 429 U.S. 861 (1976). In fact, the district court's power extends to control attorneys' conduct outside the courtroom. *United States v. Hvass,* 355 U.S. 570 (1958).

insure against specific abuses of a special judicial process; and (2) the generalized first amendment concerns[29] of the parties before the court, who have submitted to the court's jurisdiction.

Part I of this argument demonstrated that the order here was required to permit the district court to manage effectively this litigation at a particular stress point and to insure misleading information did not pass from parties and their counsel to others directly affected by the litigation who depend upon the district court for their protection.[30] In the commercial area, this Court has traditionally recognized a strong governmental interest in preventing false and misleading speech. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 758-759 (1976); *Friedman v. Rogers,* 440 U.S. 1

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29. One of these concerns is that the monitoring order unconstitutionally interfered with Respondents' associational rights under the first amendment by preventing solicitation. It is true this Court has allowed solicitation when undertaken to express political beliefs and associational freedoms. *In re Primus,* 436 U.S. 412 (1978). The *Primus* case relied heavily for its support on *NAACP v. Button,* 371 U.S. 415 (1963), a case which allowed attorneys to solicit for the purpose of furthering the civil rights objectives of the organization and its members. *Button* has been interpreted by this Court as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576, 585 (1971). *See also Bates v. State Bar of Arizona,* 433 U.S. 350, 376 n.32 (1977). The order here did not interfere with any constitutional right of access to the courts since the order was entered during ongoing litigation to manage a complicated class action case that had begun to feel the pressures of abuse.

30. In restricting outside influences, the courts have recognized that the right to a fair trial both in civil and criminal cases is one of our most cherished values and that a trial judge should "have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity." *See CBS v. Young,* 522 F.2d 234, 241 (6th Cir. 1975).

(1979).[31] How much stronger should that concern be when the communication originates, in a very real sense, in the district court itself,[32] and when those desiring to communicate the speech are, at least to some degree, doing so as officers of the court?[33] *See Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975). This question was answered to a great extent in *United States Civil Service Commsision v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973), where this Court sustained restrictions on the freedom of political expression of government employees. In doing so, it noted that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general'." *Id.* at 564. Similarly,

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31. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate. . . ." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), quoting *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964).

32. In *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), this Court emphasized that the fiduciary role of those who sought to communicate on the public air medium permitted the imposition on speech of restrictions which otherwise would be impermissible. Those who use the medium of their role in federal litigation as a method of communication can certainly be held to the same obligation.

33. "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Nebraska Press Ass'n v. Stuart, supra,* at 601, n.27 (Brennan, J., concurring). The same rationale must apply to parties since having submitted to the jurisdiction of the court, they have implicitly agreed to comply with the court's attempt to administer justice properly. *Cf. Snepp v. United States,* 444 U.S. 507 (1980). Absent class members have a right to expect protection by the court and, in absence of this protection, this Court has granted them special rights to protect themselves. *See United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977) (where this Court said the district court may have a responsibility to allow an absent class member to intervene to appeal the denial of class certification).

in this case, the district court has an interest, indeed an obligation, to monitor the conduct of the attorneys and of the parties who are conducting litigation before the court. As in the case of the statute in *Letter Carriers,* the order here discriminates "against no racial, ethnic, or religious minorities. Nor [does it] seek to control political opinions or beliefs. . . ." *Id.* at 564. In *Letter Carriers,* the Court also ruled "that it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative government is not to be eroded to a disastrous extent." *Id.* at 565. Similarly, the district court here had a legitimate constitutionally based concern in ensuring that this class action was conducted in a manner which not only avoided injustice but the appearance of injustice.

B. The order entered in this case is not a prior restraint.

In reconciling the competing constitutional values of freedom of speech and fairness to the litigant on the one hand and the effective administration of justice in the federal judicial system on the other, there is a great temptation to "pigeonhole" this order into one of the classical modes of first amendment analysis. First amendment questions should not be analyzed by forcing them into rigid preconceived categories. On the contrary, this Court has required a careful balancing of the competing constitutional interests. *See, e.g., Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979). Thus, while it would not automatically be fatal, *Times Film Corp. v. Chicago,* 365 U.S. 43, 47-49 (1961), affixing the "prior restraint" label would expedite reaching a pre-packaged result since such a label carries with it a "heavy presump-

tion" against its validity. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 545 (1976), citing *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971). Yet, such an approach would hardly recognize the careful functional analysis which Justice Frankfurter emphasized was so important if the result is to reflect a true reconciliation of competing constitutional concerns. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 441 (1957). When the approach suggested by Justice Frankfurter is followed, this order is not a prior restraint of first amendment rights. The order here neither placed an "absolute ban on access," *Gannett Co. v. DePasquale, supra,* at 393, nor "restrained publication of, or comment upon, information, . . ." *Id.* at 411 (Blackmun, J., concurring in part and dissenting in part), for it allowed free exercise of speech without prior court approval. Moreover, the order operated in an even-handed way on all parties[34] and was not aimed at any particular group or ideology.[35]

In examining the present order, it becomes immediately apparent that this is an especially inappropriate case in which to rely upon the "talismanic test" of "prior restraint," *Kingsley Books, Inc. v. Brown, supra,* at 441, since under the order in question a broad "exception" exists allowing all constitutionally protected communications without prior approval of the district court.

This exception, as a practical matter, limits severely the scope of the information subject to prior scrutiny. Under

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34. The order did allow resumption of the conciliation process under the court's supervision. (J.A. 125).

35. *Cf. United States Civil Service Commission v. National Ass'n of Letter Carriers, supra,* at 564 where this Court noted "[t]he restrictions so far imposed . . . are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described."

this exception, all expressions assertedly protected by the first amendment may be made by the parties or their counsel free of prior restraint. *See Waldo v. Lakeshore Estates, Inc., supra,* at 789. Indeed, the exception is preserved in the instant order even though, for example, the party or attorney may assert the constitutional right to solicit legal representation of potential class members. [An activity specifically prohibited by ¶ 2 of the order (J.A. 124).] In a contempt proceeding to punish such solicitations, the test would be the applicable constitutional test for solicitation in effect at the time the violation is charged. Presently, this would require an analysis by the court of whether the solicitation was commercial, under the standards of *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) or whether the solicitation was a form of political expression under the standard of *In re Primus, supra.* Thus, the order's exception allows any court imposed prohibition on speech to be constitutionally challenged by the one charged with its violation[36] and then only after all the safeguards of the criminal justice system are fulfilled.[37] For that reason the inquiry

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36. *See United States v. Ryan,* 402 U.S. 530 (1971) where a party was served with a subpoena and upon appeal of the denial to quash, this Court held the party must either obey the subpoena or refuse to do so and contest its validity during the contempt proceeding. *Accord, Cobbledick v. United States,* 309 U.S. 323 (1940); *Thomas v. Collins,* 323 U.S. 516 (1945); *Union Tool Co. v. Wilson,* 259 U.S. 107, 110-111 (1922). *See also In re Halkin,* 598 F.2d 176, 199 (D.D.C. 1979); *Chicago Council of Lawyers v. Bauer, supra. Contra, United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1972), *cert. denied,* 414 U.S. 979 (1973). *Walker v. Birmingham,* 388 U.S. 307 (1967), was distinguished in *Ryan* on the basis that the party charged with contempt did not avail himself of earlier review of the underlying order. *United States v. Ryan, supra,* at 532 n.4.

37. Violations of the order would be punished by criminal contempt since the objective would be to vindicate the authority of the court. *See Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911),

into the order's validity cannot proceed on the basis of its assumed constitutional infirmity as a "prior restraint." *See Waldo v. Lakeshore Estates, Inc., supra* at 789; *cf. Vance v. Universal Amusement Co.*, 445 U.S. 308, 320 (1980) (White, J., dissenting).

In addition, the order does not unduly "chill" first amendment rights since the one charged with its violation can challenge the constitutionality of any prohibition on speech during appeal of the contempt conviction. *See United States v. Ryan, supra,* discussed in n.36, *infra.*

C. The facts in this case support entry of the order based on any of the previously articulated standards.

Having shown the "self-wielding sword" of "prior restraint"[38] to be a particularly inappropriate standard by which to judge the order, this Court must articulate the governing standard for all district courts faced with the reconciliation of constitutional values placed in competing

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where this Court said: "[i]f it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *See also Shillitani v. United States,* 384 U.S. 364, 370 (1966). When charged with contempt a party is entitled to the notice requirements of Fed. R. Crim. P. 42(b); to counsel, *In re Oliver,* 333 U.S. 257, 275 (1948); to trial by jury in serious cases, *Bloom v. Illinois,* 391 U.S. 194, 211 (1968); and to have the charges proven beyond a reasonable doubt. *Michaelson v. United States,* 266 U.S. 42, 66 (1924). Further, there must be proof of criminal intent to violate the order of the court. *United States v. Marx,* 553 F.2d 874, 876 (4th Cir. 1977). Whether a criminal contempt is "serious" depends on the size of the fine and the length of the incarceration. In *Cheff v. Schnackenberg,* 384 U.S. 373 (1966), the Court held that imprisonment for a period of six months for criminal contempt was punishment for a petty offense and therefore no jury trial was required.

38. *Kingsley Books, Inc. v. Brown, supra* at 441.

roles by entry of the order. Several standards have been suggested in earlier cases and by the Board of Editors of the *Manual.*

The Board of Editors, on the basis of their broad experience in the administration of justice in the class action context, have taken the position that the very nature of the unique class action device creates sufficient justification for entry of the order.[39] *Manual, supra.* The Board of Editors rejected the requirement that a "real" or "set" abuse of the policies behind Rule 23 must occur before a court could enter their proposed order. *Id.* It took this position because the types of communication which hold the potential for abuse are so numerous and unpredictable they defy "exhaustive definitions." *Id. See Waldo v. Lakeshore Estates, Inc., supra,*

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39. Even if this Court chooses to articulate a more exacting standard for the entry of such an order, the observations of the editors of the *Manual* are nevertheless very relevant with respect to any contention that the order is overbroad or vague. With respect to overbreadth, this Court noted in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), that "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine" and ought to be "employed by the court sparingly and only as a last resort." *Id.* at 613. Here, the order is not "directed at particular groups or viewpoints," *id.* at 616, but seeks to regulate, "in an even-handed and neutral manner," *id.*, the conduct of those engaged in litigation before the court. It describes the forbidden conduct as precisely and as narrowly as the nature of the litigation situation permits. As this Court noted in *Broadrick,* "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statutes' plainly legitimate sweep." *Id.* at 615. With respect to vagueness, the order in question does not require attorneys in civil litigation or clients acting under their advice to "guess at its meaning," *id.* at 607, quoting *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). The order only prohibits "easily identifiable and constitutionally prescribable" conduct. *United States Civil Service Commission v. National Ass'n of Letter Carriers, supra,* at 581.

at 789-791. The Board of Editors recommended the proposed order not be changed, even though some commentators and courts have indicated their dissatisfaction. *Manual, supra,* (Cumm. Supp.).[40]

On the other hand, some courts have required a showing of "reasonable probability" of prejudice to the fair administration of justice before restrictive orders could be entered. *United States v. Tijerina,* 412 F.2d 661, 666-667 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969);[41] *See also Hirschkop v. Snead,* 594 F.2d 356 (4th Cir. 1979); *Younger v. Smith,* 30 Cal. App. 3d 138; 106 Cal. Rptr. 225 (Ct. App. 1973). Still other courts would require a showing of "serious and imminent" danger to the administration of justice before entering the order. *See Chicago Council of Lawyers v. Bauer, supra; Rodgers v. United States Steel Corp.,* 536 F.2d 1001 (3d Cir. 1976).

The facts in this case established threats of abuse to the class action device sufficient to justify entry of the order based upon any of the standards articulated. The very nature and intensity of the competing forces which

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40. *See* n.11, p. 18, *infra.*

41. The court in *Tijerina* adopted the "reasonable likelihood" standard and specifically rejected the application of the "clear and present danger test" raised in *Bridges v. California,* 314 U.S. 252 (1941) and applied in *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Craig v. Harney,* 331 U.S. 367 (1947); and *Wood v. Georgia,* 370 U.S. 375 (1962). In so doing, the court noted that none of the above decisions dealt with a situation where a contempt arose from the violation of an order; rather, all these cases concerned extrajudicial statements which, in the absence of a prohibitive order, were said to obstruct the administration of justice. *United States v. Tijerina, supra,* at 666. It was recognized that "[t]he Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial." *Id. See also Sheppard v. Maxwell, supra,* at 363.

occurred at the unusually delicate stage of this litigation demanded entry of the order. These forces, in fact, threatened the rights of potential class members and challenged the class management ability of the district court. As guardian of the absentees' rights and as administrator of the unique class action process, the district court fulfilled its duty to actively monitor the actions of the parties —a duty imposed by the decisions of this Court.

CONCLUSION

Therefore, the decision of the United States Court of Appeals for the Fifth Circuit invalidating the order monitoring communications should be reversed, and the district court's order should be reinstated.

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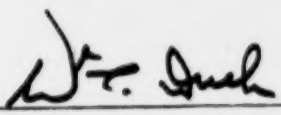

WM. G. DUCK

No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, *et al.*,

Petitioners,

vs.

WESLEY P. BERNARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented*

Whether the district court's several orders restraining communication by plaintiffs and their attorneys with members of the potential class in this civil rights action violated the Constitution or the Federal Rules of Civil Procedure, where there were no findings of any improper conduct by plaintiffs or their counsel, the uncontradicted evidence demonstrates no misconduct by them, and no evidentiary hearing was ever held.

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*/ Respondents do not accept petitioners' formulation of the question presented. See, Sup. Ct. Rule 34.2. First, three orders were issued barring communications, not one. Second, the district court made no findings of any abuse, actual or potential, and the Fifth Circuit panel opinions (JA 195, n.14, 209-210 and n.9) and the en banc court (JA 241 and n.7) found petitioners' allegations of specific abuse "irrelevant." Moreover, petitioners' brief cites no "actual" abuse, and refers only to unsupported "threats of abuse" and "threatened abuses." Brief for Petitioners, pp. 11, 22, 36. Third, although petitioners' question raises only the issue of the constitutionality of the several orders, their brief, pp. 14-26, also considers whether the orders comply with Rule 23, Fed. R. Civ. Pro., as did the Fifth Circuit. (JA 190-195, 208-216, 268, 269-276).

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42 U.S.C. §§ 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 ..... Passim

Rules:

Rule 34.2, Rules of the Supreme Court i

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Rule 23, Fed. R. Civ. Pro. ..... Passim

Rule 65, Fed. R. Civ. Pro. 15

Rule 83, Fed. R. Civ. Pro.

Other Authorities:

ABA Code of Professional Responsibility, DR 2-104(a)(1) 53

ABA Code of Professional Responsibility, DR 7-104 60

ABA Code of Professional Responsibility, EC 2-3 57

II ABA Comm. on Professional Ethics, Informal Ethics Opinions 537-540. Inform. Op. No. 1280, Aug. 8, 1973 (ABA 1975) 55

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II ABA Comm. on Ethics and Professional Responsibility, Informal Ethics Opinions, Inform. Op. No. 1283, Nov. 20, 1973 (ABA 1975) 55

ABA Comm. on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957) 36, 53, 57

Advisory Comm. Notes, Proposed Rules of Civil Procedure, 39 F.R.D. 69 (1966) 98

Comment, Judicial Screening of Class Action Communications, 55 N.Y.U. L. Rev. 670 (1980) (forthcoming) ... 50

Comment, Restrictions on Communication by Class Action Parties and Attorneys, 1980 Duke L.J. 360 50

118 Cong. Rec. 940-41 (1972) 87

118 Cong. Rec. 7168 (1972) 103

88 Harv. L. Rev. 1911 (1975) 50, 66

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Manual for Complex and Multi-District Litigation, 49 F.R.D. 217 (1970) 15

Manual for Complex Litigation, 1 Pt. 2 Moore's Federal Practice (2d ed. 1980) Passim

Note, The Right To Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966) 85

S. Rep. No. 94-1011, Civil Rights Attorneys' Fees Awards Act of 1976, 94th Cong., 2d Sess. (1976) 44

Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920 (1978) 50, 67, 79

U.S. Bureau of the Census, 1970 Census of Population: General Social and Economic Characteristics, PC (1)-(45) (Texas) 96

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Wilson, Control of Class Action Abuses Through Regulation of Communications, 4 Class Action Rpts. 632 (1975) 50

No. 80-441

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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GULF OIL COMPANY, et al.,

Petitioners,

vs.

WESLEY P. BERNARD, et al.,

Respondents.

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

Statement of the Case[1/]

This employment discrimination action was filed by six present or retired black employ-

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1/ "Understanding the issues requires a more complete history than [a] brief statement," as the Fifth Circuit observed. (JA 199, see 234). Cf., NAACP v. Button, 371 U.S. 415, 419-426 (1963). Petitioners' cursory statement of the case, Br, pp. 3-7, provides an inaccurate account of the record.

ees of Gulf Oil Company's Port Arthur, Texas refinery (hereinafter "Gulf") against Gulf and the Oil Chemical and Atomic Workers International Union and Local Union No. 4-23 (hereinafter "unions") for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (JA 11).[2/] The issue is the validity of three orders of the district court restraining communication by plaintiffs and their counsel with potential class members.

Administrative Proceedings

In June 1967, three of the plaintiffs, Wesley P. Bernard, Hence Brown, Jr., and Willie Johnson filed charges of racial discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") against Gulf and the local union

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2/ Citations are to the Joint Appendix (hereinafter "JA"). The Brief For Petitioners will be referred to hereinafter as "Br."

pursuant to Title VII. (JA 177).[3/] The EEOC investigated and issued decisions of reasonable cause sustaining the three charges in August 1968. (JA 178). On February 26, 1975, the three complainants received letters from the EEOC stating that Gulf and the local union did not wish to continue conciliation discussions, and that they could request, at any time, notices of right to sue pursuant to Title VII. (JA 178, n.2). See, 42 U.S.C. § 2000e-5(f)(1).

Meanwhile, a separate charge of discrimination on the basis of both race and sex at the Port Arthur refinery was filed against Gulf by a Commissioner of the EEOC in 1968. (JA 26). See, 42 U.S.C. § 2000e-5(b). Reasonable cause was found to sustain the charge, and Gulf commenced conciliation discussions with the EEOC and the Office of Equal Opportunity of the United States Department of the Interior. Eventually, a

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3/ Overall, more than 40 charges of employment discrimination were filed by black employees with the EEOC against the company in 1967. Brief for the Equal Employment Opportunity Commission, Amicus Curiae, On Rehearing En Banc, 5th Cir., 77-1502, at 2.

conciliation agreement was signed by Gulf, EEOC and the Department of the Interior on April 14, 1976. (JA 26).

The conciliation agreement provided relief in three primary areas: "back pay,"[4/] "goals and timetables" for upgrading certain employees,[5/]

4/ Back pay was provided to black persons employed by Gulf on July 2, 1965, whose seniority date anteceded July 1, 1957, and to hourly rated women employed in Gulf's Package and Grease Department on July 2, 1965. (JA 28). The formula for back pay for black employees was $5.62 for each month of continuous service prior to January 1, 1957, and $2.81 for each month of continuous service thereafter until termination or until January 1, 1971, whichever is earlier. (JA 30). Back pay for female employees was figured on the basis of $5.62 for each month of continuous service until termination or until July 1, 1975, whichever is earlier. Id.

5/ Black employees who were eligible for back pay and were presently employed in certain menial positions (Operator Helper No. 1, Boiler Washing "X," Brander "X," Operator Helper No. 2, Utility Helper and Laborer) and women employees with seniority anteceding April 5, 1974, were made eligible for "affirmative action goals and timetables". (JA 32). The relief involved a goal to

and a general "affirmative action" provision.[6] The agreement required that employees accepting back pay execute releases of all employment discrimination claims against Gulf, and it established a procedure for tender and acceptance of back pay (JA 31). The agreement further provided

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5/ continued

fill one of every five vacancies in 43 "target classifications" (identified as classifications in which blacks, Spanish-surnamed persons and/or women were statistically underrepresented), and a goal to fill one of every seven official and manager category positions with a black, Spanish-surnamed or female employee until their respective representation jointly within such clasification equalled or exceeded their joint representation in the company's workforce. (JA 32-35).

6/ "[Gulf] agrees to refine and strengthen on a continuing basis positive and objective nondiscriminatory employment standards, procedures and practices and represents that in its business operations it exerts continuing effort to uniformly apply such standards, practices, and procedures in a manner which will assure equal employment opportunites in all aspects of its total workforce and operation without regard to race, color, religion, sex or national origin."

(JA 38).

that failure to respond within thirty days to notice of the tender and the release agreement was to be deemed an acceptance of back pay. (Id.) However, the letter which Gulf sent to eligible employees did not inform them that silence would be deemed an acceptance.[7/] Contrary to the terms of the agreement (JA 31), the letter did not disclose the formula used in calculating back pay. The letter admonished employees that, "Because this offer is personal in nature, Gulf asks that you not discuss it with others." Gulf represents that letters offering over $900,000 in back pay were sent to 614 black employees and former employees and 29 women employees immediately after the agreement was signed. (JA 22-23).

Neither the plaintiffs nor any members of the potential class were parties to the conciliation

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7/ This letter is reproduced as Addendum A to this brief. Although the letter does not appear in the record as transmitted by the district court, that court referred to and briefly described the letter in its order of June 22, 1976. (JA 128). The letter was also before the court of appeals. See Brief for the United States as Amicus Curiae on Rehearing En Banc, p.6 and Exhibit 1. Therefore, the letter may properly be considered by this Court.

agreement, nor was the agreement subject to any judicial review or approval. The plaintiffs found the relief provided in the conciliation agreement grossly inadequate.[8/] Under the agreement a black employee who, like plaintiff Wesley

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8/ In a memorandum filed in the district court, plaintiffs stated in part as follows:

> "... [T]he agreement on its face does not appear to satisfy the dictates of Title VII. For instance, the Conciliation Agreement does not provide for well-established types of relief such as advance-level entry and job by-pass; there is a one-shot opportunity to bid and transfer into a different job classification; there are no provisions for a firm recruitment program; there is no firm commitment on goals and timetables; the affirmative action program is merely a statement of policy rather than a realistic, programmatic approach to the underutilization of minorities in the defendant's work-force. The goals provided, one black, Mexican-American, or woman for each four whites selected for jobs from which blacks are underutilized (the goals is one to six for supervisory positions) is inadequate to remedy the practices of discrimination in an area where over 50% of the population is black; there is no relief from unlawful employment testing programs. These are only some of the examples of how the Agreement does not begin to

Bernard, had worked at Gulf's Port Arthur refinery since June 1954, was entitled to a total "back pay" settlement of approximately $640, less deductions for social security and income taxes.[9] Therefore, plaintiffs filed this action in the district court.

8/ continued

> approach the relief requested by the plaintiffs. In fact, the settlement agreement simply does not satisfy the purpose underlying fair employment litigation which is to make whole those persons injured by discriminatory employment practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
>
> "Additionally, the notices that were sent out to back pay eligibles under the Conciliation Agreement did not explain the types and extent of relief in the agreement, and did not explain the method by which backpay was computed. Further, the affected employees were not told that acceptance of the agreement would be assumed if after the passage of thirty days, the employees had not responded to Gulf's notice...."

(JA 108, 109). See, infra n.67.

9/ See, supra, p. 4, n.4.

Plaintiffs' Complaint and Their Counsel

On May 18, 1976, plaintiffs[10] filed this suit as a class action in the United States District Court, Eastern District of Texas, Hon. Joe J. Fisher, Chief Judge, presiding. (JA 11). The complaint alleged that "[b]lack employees of Gulf Oil are, and have in the past, been victims of systematic racial discrimination" by Gulf and the unions. (JA 15).[11] The relief sought by the

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10/ Plaintiff Wesley P. Bernard was hired by the company in June 1954 as a laborer and at the time of filing was a truck driver. Plaintiff Elton Hayes, Sr. was hired in October 1946 as a laborer, worked in various "helper" positions and at the time of filing was a brickmaker. Plaintiff Hence Brown, Jr. was hired as a laborer in 1954 and at the time of filing was a truck driver. Plaintiff Willie Whitley was hired as a laborer in 1946 and retired as a utility man, a classification slightly above laborer, in October 1975. Plaintiff Rodney Tizeno was originally hired as a laborer and at the time of filing was employed as a craftsman. Plaintiff Willie Johnson was hired as a laborer. (JA 13, 14). Plaintiff Whitley died in 1980.

11/ Among the areas in which discrimination was alleged were: hiring and initial job assignments;

complaint included recruitment of blacks and the following measures for incumbent employees: (a) use of company seniority in bidding for better paying and more desirable jobs; (b) restructuring lines of progression, revision of residency requirements, advanced level entry and job skipping; (c) training; (d) back pay; (e) rate protection so black employees will not be deterred from advancement; (f) prospective "red circling" to alleviate the residual effects of discrimination; (g) suspension of all tests and other criteria for promotion and initial employment until the tests and criteria are validated; (h) requiring the local union to process grievances of its black members; and (i) a declaration that the acts and

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11/ continued

use of unvalidated and discriminatory tests and a high school diploma requirement; exclusion from craft and journeymen positions; racially separate lines of progression, job classifications and departments; denial of promotional training opportunities; unequal pay for comparable work; exercise of seniority rights; exclusion from supervisory, technical, professional and clerical positions; discipline and discharge; and the acquiescence in or condoning of unlawful discrimination by the unions. (JA 15-18).

practices complained of violate federal law. (JA 18-20). The complaint also specifically prayed for an award of costs, including reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k). (JA 20).

Plaintiffs and the potential class were represented by attorneys associated with the NAACP Legal Defense and Educational Fund, Inc. (hereinafter "NAACP Legal Defense Fund" or "LDF"), a non-profit corporation engaged in furnishing legal assistance in cases involving claims of racial discrimination. (JA 111).[12/] Three of plaintiffs'

12/ The NAACP Legal Defense Fund, which is entirely separate and apart from the National Association for the Advancement of Colored People, has been approved by the Appellate Division of the State of New York to function as a legal aid organization. (Id.) This Court has recognized the LDF as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation" and engaged in "a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain." NAACP v. Button, supra, 371 U.S. at 433. Employment discrimination cases in which LDF counsel have appeared in this Court include Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975);

counsel--Jack Greenberg, Barry L. Goldstein and Ulysses Gene Thibodeaux--were employed by the Fund as staff attorneys. (JA 81-82 n.1, 111, 115). Stella M. Morrison of Port Arthur, Texas, and Charles E. Cotton of New Orleans, Louisiana, private practitioners with experience in fair employment litigation, were associated with the NAACP Legal Defense Fund as local counsel. (JA 81-82 n.1, 118).[13/] None of the attorneys has accepted or expects to receive any compensation from the named plaintiffs, from any plaintiffs who may be added, or from any members of the potential class. (JA 113, 119). Any counsel fees which they might obtain would come from an award

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12/ continued

and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Attorneys employed by the LDF have represented individuals in hundreds of civil rights cases in the Fifth Circuit and in the district courts of that Circuit. Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 n.14 (5th Cir. 1970).

13/ See, NAACP v. Button, supra 371 U.S. at 421, n.5. Since 1976, Mr. Thibodeaux has gone into private practice in Lake Charles, Louisiana. He remains one of plaintiffs' counsel.

by the court which, as expressly prayed for in the complaint (JA 20), would be taxed against defendants pursuant to 42 U.S.C. § 2000e-5(k). (JA 113, 119). Any award of fees to staff attorneys of the NAACP Legal Defense Fund would be paid over to LDF for support of its programs. (JA 113).

The May 28 Order

On May 22, 1976, four days after the complaint was filed, the named plaintiffs held a meeting in Port Arthur which was attended by members of the potential class. (JA 115, 118). Three attorneys for the named plaintiffs and potential class accepted an invitation to attend the meeting to discuss issues in the suit, types of relief requested, and administrative and legal problems in fair employment litigation, and to answer questions about the suit and conciliation agreement. (JA 116).

Five days after the meeting, Gulf filed a short motion, unverified and unsupported by any sworn statement, to limit communications with any potential or actual class member. (JA 21). The

motion was filed in Judge Fisher's absence and sought entry of an order pending his return. In its supporting memorandum (JA 22), Gulf's counsel described the conciliation agreement, set forth Gulf's efforts to tender back pay awards and solicit releases, and announced that Gulf had suspended mailings to employees pending court action. Counsel also asserted, without identifying any informant, that one of plaintiffs' counsel made allegedly unethical and improper statements at the May 22 meeting.[14/] The memorandum sought

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14/ "... [O]n Saturday, May 22, 1976, four days after the Complaint was filed in this action, an attorney for the Plaintiffs, Mr. Ulysses Gene Thibodeaux, appeared before approximately 75 actual or potential class members at a meeting in Port Arthur and discussed with them the issues involved in the case and recommended to those employees that they not sign the receipt and general release which has been mailed to them pursuant to the Conciliation Agreement. In fact, it is reported to Gulf that Mr Thibodeaux advised this group that they should mail back to Gulf the checks they had received since he could recover at least double the amount which was paid to them

entry of a proposed order limiting communication in order to "preserve the status quo."[15/] Gulf's proposed order was taken verbatim from "Sample Pretrial Order No. 15: Prevention of Potential Abuse of Class Action," Manual for Complex and Multidistrict Litigation (1970) p. 197. (Id.)[16/] Plaintiffs had no opportunity to submit contravening proof or to reply prior to the court's order.

The next day, District Judge William M. Steger granted the motion and entered Gulf's

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14/ continued

under the Conciliation Agreement by prosecuting the present lawsuit."

(JA 23, 24).

15/ Although Gulf now characterizes its motion as an "emergency" motion, Br. p. 5, none of the requisites for affidavit or verified pleading, hearing or notice for either a temporary restraining order or preliminary injunction were pleaded or supplied. Rule 65, Fed. R. Civ. Pro.

16/ Attached to the memorandum were the conciliation agreement and a letter from company counsel suspending further mailing of checks and other contacts pursuant to the conciliation agreement. (JA 26, 43).

proposed order ex parte. (JA 1).[17/] By its terms, the order forbade, without exception, all communications by parties or their counsel with any class member pending Judge Fisher's return. The text of the order is set forth in the Joint Appendix at pages 44-45. The order states that parties and their counsel "are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class members not a formal party to the action." Id. The forbidden communications included, but were not limited to, (a) solicitation of legal representation, (b) solicitation of fees, expenses and arrangements to pay fees and ex-

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17/ Gulf no longer maintains that the May 28 order was entered "without formal objection by Respondents." Compare, Petition for a Writ of Certiorari, p. 7, with, Br, p 5. Gulf represented in both courts below that Judge Steger's order was issued after hearing argument of counsel for plaintiffs and the company. (See, e.g., JA 48, 202). However, the record shows that the motion was granted ex parte with no argument or hearing. (JA 3). Plaintiffs filed a memorandum of law in opposition to the motion on June 10, 1976, only after receipt of notice of the court's order and, indeed, after the filing of Gulf's subsequent motion to modify the order. (JA 46). See, JA 4, 80.

penses, (c) solicitation to opt out of Rule 23(b)(3) actions, and (d) communications "which may tend to misrepresent the status, purposes and effects of the class action, and of impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice." (Id.) No findings of fact or conclusions of law were made, and the Fifth Circuit considered Gulf's allegations of abuse "irrelevant." (JA 195 n.14, 209-210 and n.9, 241 and n.70).

The June 22 Order

On June 8, 1976, Gulf filed a motion to modify the May 28 order "to allow Gulf to comply with the terms of the Conciliation Agreement . . . by resuming under the Court's supervision the payment of back pay awards to employees covered by the Conciliation Agreement and obtaining from those employees receipts and releases all as provided for by the terms of the Conciliation Agreement." (JA 46). The supporting memorandum reiterated statements "reported to Gulf" about plaintiffs' counsel at the May 22 meeting, and

added that: "In fact, it is reported that Mr. Thibodeaux stated even if the employee had signed the receipt and release, he should now return the check which had been mailed to the employee by Gulf." (JA 47). Again, Gulf declined to provide any support for its hearsay allegations. However, Gulf did again attach the conciliation agreement and, in addition, the sworn affidavits of officials of the EEOC and Department of the Interior. (JA 71, 76).[18/]

On June 11, 1976, the district court heard argument of counsel, but heard no witnesses and took no evidence. (See, JA 203, 235). Thereafter, Gulf submitted a supplemental legal memorandum, a copy of the Manual for Complex Litigation (1973), Part II, § 1.41 Sample Pretrial Order No. 15, and a proposed order. (JA 92, 97, 99). Plaintiffs filed affidavits of counsel, which

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18/ The officials, who participated in the negotiation of the conciliation agreement, stated that, in their opinion, the agreement was a thorough and effective solution to charges that Gulf discriminated at its Port Arthur refinery in violation of Title VII, and that Gulf should be allowed to proceed with completing back pay awards and receiving releases under the conciliation agreement. (Id.)

stated that plaintiffs were represented by counsel associated with the NAACP Legal Defense Fund, explained the nature of the Fund's work, and stated that the only compensation plaintiffs' counsel expected would be through statutory taxation of costs and fees. (JA 107, n.1, 111, 115, 118). The affidavit of Mr. Thibodeaux directly contravened Gulf's account of his statements at the May 22 meeting.[19/] The affidavit of Ms. Morrison, another of plaintiffs' counsel who attended the meeting, corroborated Mr. Thibodeaux's affidavit. (JA 118). Counsel also averred that to date 34 individual members of the class had signed retainer agreements with plain-

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19/

> "7. Contrary to the Company's assertion in its memoranda filed on May 27 and June 8, 1976, I did not at any time during the course of the meeting advise actual or potential class members not to accept the defendant's offer of settlement, nor did I state to the assembled group that counsel for the plaintiffs could obtain twice the amount of backpay for the class as has been offered to them under the Conciliation Agreement of April 14, 1976."

(JA 116).

tiffs' counsel to represent them in the litigation. (JA 119).

The affidavits of plaintiffs' counsel stated that communication with potential class members was necessary for effective representation of claims of class members, defining the scope of the issues, investigating claims of systematic and individual discrimination, preparing witnesses, supplementing available documentary materials and completing discovery, and generally informing class members of their rights and answering questions. (JA 113, 114, 116, 117).[20/]

On June 22, 1976, the district court modified the May 28 order, and adopted Gulf's proposed order based on the Manual for Complex Litigation. The June 22 order restrained communications by the parties and their counsel with members of the potential class, while authorizing the clerk of court to send a notice to class members offering

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20/ Plaintiffs also addressed Gulf's claim that the conciliation agreement was a thorough and effective resolution of employment discrimination at the Port Arthur refinery. See, supra, pp. 7-8, n.8.

back pay and soliciting releases under the conciliation agreement. The complete text of the order is reprinted in the Joint Appendix at pages 124-127, 189-191, n.9, and 236-238, n.4. The order reiterated the prohibition in the May 28 order, see, supra, at pp. 16-17, with two exceptions, viz., communications initiated by a client or prospective client, and communications by a public office or agency which do not have the effect of solicitation of representation or misrepresenting the action or orders. The order also provided that:

> "If any party or counsel for a party asserts a constitutional right to communicate with any members of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication, file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral."

(JA 125).

The court, relying on the Manual for Complex Litigation, rejected the contention that the restraint of communications was unconstitutional. The order also provided that Gulf be allowed to proceed with

the payment of back pay awards and obtaining of receipts and releases from those employees covered by the conciliation agreement and that the clerk of court mail an attached notice to each covered employee concerning acceptance of the offer within 45 days, and the order set forth a timetable for employee acceptances and for Gulf's reporting of acceptances.

The basis for entry of the order was not explained and no findings of fact or conclusions of law were made. "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would have been procedurally improper and without evidentiary support." (JA 241) (Fifth Circuit en banc opinion).21/

21/ Petitioners erroneously refer to certain "facts supporting entry of the order." Br. pp. 22-23 and n.18, p. 25.

Judge Godbold noted that "Gulf restates hearsay as though it were fact proved and found." (JA 210, n.9). In this Court, Gulf continues to reiterate the alleged statements of plaintiffs' counsel. See, Br., pp. 5, 23 and n.18. The

The August 10 Order

The broad scope of the June 22 order was soon confirmed. On July 6, 1976, plaintiffs moved (a) for permission for themselves and their counsel to contact and interview members of the proposed class, and (b) to declare that an attached leaflet is "within the constitutionally protected rights of the plaintiffs and their counsel" and to permit its dissemination within the 45 day period allowed for members of the class to respond to the conciliation agreement tender pursuant to the June

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21/ continued

unsworn hearsay was rebutted by direct affidavit, which was the only evidence before the court. Gulf could have, but did not, present any countervailing proof.

The suggestions that the June 22 order was issued upon a complete record showing the class action process was threatened by abuse and after a hearing, see, Br, p. 22 and n.16, are also erroneous. Of the five affidavits submitted, the only affidavits on abuse were those of plaintiffs' counsel, which demonstrated that no unethical or improper conduct had occurred or was likely to occur. See, supra at p. 19. There was no evidentiary hearing. The district court merely heard oral argument by counsel, and Gulf never produced any evidence to substantiate its unsworn hearsay allegations. See, supra at p. 18.

22 order. (JA 130-131). The leaflet, inter alia, advised Gulf's black employees to consult a lawyer about the conciliation releases, offered the names, addresses and telephone numbers of several of plaintiffs' counsel for free consultation, and described the lawsuit. The original leaflet is reproduced in Addendum B to this brief.

Plaintiffs' motion for permission to communicate with the proposed class was denied on August 10, 1976, two days after the 45 day period for acceptance of back pay tenders had expired. (JA 157, see, 208, 236). The district court's order consisted of one sentence stating "that the Motion is hereby denied." (JA 157). No findings of fact or conclusions of law were made.

Other Proceedings

On January 11, 1977, the district court granted summary judgment for Gulf and the unions, dismissing the complaint as untimely. (JA 170). On appeal, a panel of the Fifth Circuit unanimously reversed the dismissal of the complaint but, by a divided court, affirmed the orders restraining

communications. (JA 175). Judge Godbold filed an extensive dissent on the communications issue. (JA 199).

On rehearing en banc, the Fifth Circuit, in an opinion authored by Judge Godbold, adopted the panel opinion insofar as it reversed the district court's dismissal of the complaint. (JA 231, 234). By a vote of twenty-one to one, the en banc court also reversed the orders restraining communications. (Id.) Thirteen members of the court held that the orders violated both the First Amendment and Rule 23, Fed. R. Civ. Pro. (Id.) Eight judges, agreeing that the orders were not authorized as "appropriate order[s]" under Rule 23, did not reach the constitutional issue. (JA 269, 276).

On December 8, 1980, the Court granted a writ of certiorari limited to the question of the validity of the orders restraining communications.

SUMMARY OF ARGUMENT

1. Communication by plaintiffs and their counsel with potential class members in a civil rights action, like other "'collective activity

undertaken to obtain meaningful access to the courts[,] is a fundamental right within the protection of the First Amendment.'" In re Primus, 436 U.S. 412, 426 (1978). Indeed, the right was first recognized in NAACP v. Button, 371 U.S. 415 (1963), in the context of communication by NAACP and NAACP Legal Defense Fund lawyers with putative plaintiffs concerning their participation in potential civil rights class action lawsuits.

2. The district court's orders restraining communication by plaintiffs and their counsel with the potential class were entered without any proof of actual or imminent specific misconduct or other injury. First Amendment rights cannot be impaired without such a threshold showing. The Manual for Complex Litigation simply does not provide particularized proof of misconduct adequate to justify any infringement.

3. The orders barring communication are unjustified prior restraints of protected expression and association. The provision in the June 22, 1976, order for assertion of "a constitutional right to communication" on pain

of criminal contempt does not require a different result because the orders remain a system of prior restraint which substantially burdens exercise of protected liberties.

4. The district court's orders are overbroad restraints in violation of the First Amendment rule that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963).

5. In addition, the orders restraining communication compromised the integrity of the proceedings, and denied important rights of plaintiffs and the potential class guaranteed by the due process clause of the Fifth Amendment. In particular, adequate information, effective assistance of counsel, and an adequate hearing and procedural regularity were denied in violation of the Fifth Amendment.

6. Last, the district court's gag orders impede the prosecution and processing of class actions and, therefore, are inconsistent with Rule 23 of the Federal Rules of Civil Procedure, which permits only "appropriate order[s]" to be issued. Rule 23(d). The orders forbade plaintiffs and their counsel from engaging in activities "direct-

ed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of ... discrimination claim[s]." Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), cert. denied, 434 U.S. 985 (1977). Moreover, Rule 23 should be construed to avoid grave doubts of unconstitutionality.

ARGUMENT

The record below is a virtual catalogue of the disruption that can be caused in Rule 23 actions by orders and local rules such as those recommended by §1.41 of the Manual for Complex Litigation, restraining communication by plaintiffs and their counsel with members of the potential class.[22/] The ability of plaintiffs

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22/ The Manual for Complex Litigation (1978), prepared by a Board of Editors for the Federal Judicial Center and Judicial Panel on Multidistrict Litigation, is reprinted in 1 Pt. 2 Moore's Federal Practice (2d ed. 1980) (hereinafter "Manual"). The Manual's Suggested Local Rule No. 7 and Sample Pretrial Order No. 15 are substantially identical. See, Manual, Pt. II, 225-228. The Manual is presently being revised. See Res-

and counsel to prosecute, and proper judicial management of the action both were grievously impaired.

The issue is not whether courts are powerless to deal with misconduct by counsel.[23/] The record reveals no findings of misconduct, and petitioners' unsupported allegations, reiterated here, were properly treated by all the Fifth Circuit opinions as "irrelevant." Nor is the Court presented with orders "drawn as narrowly as possible," Br, p. 8. The plain terms and operation of the orders simply explode such a

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22/ continued

pondents' Brief in Opposition to the Petition, pp. 18-19. Although a local rule is not before the Court, the same analysis under the Constitution and the Federal Rules of Civil Procedure applies to both rules and orders. See, JA 241 n.6, 252 n. 22 (Fifth Circuit en banc opinion).

23/ Where there has been misconduct by counsel, "[t]he ordinary remedy is disciplinary action against the lawyer and remedial notice to class members." Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972).

characterization. The May 28 order prohibited "all" communication by its terms and effect. See, supra at 16. The June 22 order prohibited "all" communications with four exceptions, but only one, the provision for "assert[ing] a constitutional right to communicate," as petitioners recognize, Br, p. 10, is of any conceivable significance here.[24/] The scope of the undefined protection offered by the provision is uncertain, and any possibility that the June 22 order could be saved by any such "escape hatch" was ruled out by the order of August 10 flatly denying any right to communicate with the class members. See, supra at pp. 23-24.

Nor is the Court presented with restraints based on "an overriding interest articulated in findings ..." Richmond Newspapers, Inc. v. Virginia, ___U.S. ___, 65 L.Ed.2d 973, 992 (1980). Although petitioners attempt to fill the gap by variously suggesting that the orders were issued

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24/ Petitioners advance no reason why the May 28 order was proper even though its ban on communications was the very kind of formal absolute prior restraint which they argue the June 22 order is not. Br, p. 10.

to "monitor" communications, to prevent generalized "threatened abuse" of the class action device or to forestall unspecified "misrepresentation," e.g., Br, pp. 17-26, the orders stated no purpose and none of the purposes now attributed to the district court have record support. Because plaintiffs and their counsel were completely gagged, a fortiori, no monitoring of their communication occurred. The district court's denial of plaintiffs' motion to communicate about pending back pay tenders and waivers was denied two days after the termination of the period for acceptance by the class members. Not only were no findings made, but no basis exists for finding any threat of abuse or misrepresentation. See, supra at pp. 14-19.

Petitioners' case boils down to the naked claim that "the very nature of the unique class action device creates sufficient justification for the entry of the order[s]." Br, p. 11. Plaintiffs' efforts to bring to the court's attention the adverse impact of its orders on the processing of the action were necessarily unavailing because the orders were not bottomed on

specific circumstances. They are restraints derived from §1.41 of the Manual, which recommends that in all class action suits, whether certified or not, communications by parties or counsel with actual and potential class members should be restricted. Id. at 31-32. The basis for this recommendation is the Manual's conclusion that "[t]he class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse." Id. at 31. The Manual, however, concedes that abuse is the "exception rather than the rule" and "relatively rare."[25/]

Petitioners' brief invites this Court merely to sanction the exercise of Rule 23(d) supervisory

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25/ "It must be noted, however, that generally the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order."

Manual at 36-37. As we demonstrate later, this line of reasoning has no support in the jurisprudence of this Court. See, part I of the argument.

power. Br, p. 14. This characterization ignores that the communication subject to restraint is protected by the Constitution. Plainly, government "cannot foreclose the exercise of constitutional rights by mere labels" and "may not under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, supra, 371 U.S. at 429, 439. The Court has

> "repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within [governmental] competence, or even because the laws do in fact provide a helpful means of dealing with such an evil ... [B]road rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms."

United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222 (1967).[26/]

26/ First Amendment freedoms are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental

I

THE ORDERS RESTRAINING COMMUNICATION DENIED PLAINTIFFS, THEIR COUNSEL AND POTENTIAL CLASS MEMBERS MEANINGFUL ACCESS TO THE COURTS IN VIOLATION OF THE FIRST AMENDMENT.

A. Expression and Association To Advance Litigation Are Rights Protected by the First Amendment.

1. The Principle of NAACP v. Button

The Court has recently reaffirmed the principle, first recognized in NAACP v. Button, supra, that "'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" In re Primus, supra, 436 U.S. at 426, quoting United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971). "[A]bstract discussion is not the only species of communication which the Constitution protects; the

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26/ continued

interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960); see, Shelton v. Tucker, 364 U.S. 479 (1960); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

First Amendment also protects vigorous advocacy, certainly of lawful ends, against government intrusion." Button, supra, 371 U.S. at 429.

The right of association for litigation was recognized in Button in the context of communication by NAACP and NAACP Legal Defense Fund attorneys with potential civil rights plaintiffs, both members and non-members. One purpose of the communication was to provide information about participation in class action challenges to public school segregation. The Court held that these communications are not unlawful and unethical solicitation of legal representation. 371 U.S. at 428-29.

> "In the context of NAACP objectives, litigation is not a technique for resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true for the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro

> minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

371 U.S. at 429-30.

Traditional rules against solicitation do not apply to "wholesome and beneficial" public interest litigation where legal services are offered to clients free of charge. See, e.g., ABA Committee on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957), cited by Button, 371 U.S. at 430 n.13, 440 n.19, 443 n.26.[27/] Button specifically ruled that the "superficial resemblance in form" between unethical arrangements for private gain which served no public interest, and the activities of NAACP and NAACP Legal Defense Fund lawyers

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27/ Opinion 148 approved the Liberty League's program of assisting litigation challenging New Deal legislation through a National Lawyers Committee which sought to disseminate through public media communications on the constitutionality of state and federal legislation, and to offer counsel, without fee or charge, to anyone financially unable to retain counsel who felt that such legislation violated his constitutional rights. See other authorities cited in Button, 371 U.S. at 440 n.19.

> "cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights.
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> * * *
>
> "Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."

371 U.S. at 442-43.

Efforts to confine the scope of the Button doctrine have been uniformly denied. Thus, it was recognized that "the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act [45 U.S.C. §1 et seq.] and the Federal Employers' Liability Act [45 U.S.C. §51 et seq.]." Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5 (1964). Unlike the precise facts in Button, the legal

rights involved were statutory, and the union recommended outside counsel whom it did not employ itself. Nevertheless, the Court held that "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." 377 U.S. at 8.[28/] United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967), declined to limit the Button principle to prohibit union members from collectively hiring an attorney to litigate damage claims for personal injury and death under a state workers compensation act. A state court's order barring, inter alia, a union's efforts to limit the fee charged by recommended attorneys in damage suits to a percentage of recovery under the Federal Employers' Liability Act, was reversed in United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). Again, the Court asserted that "the principle here involved cannot be limited to the

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28/ "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their rights. The right to petition the courts cannot be so handicapped." 377 U.S. at 7.

facts of this case. At issue is the basic right to group legal action ..." 401 U.S. at 585.

The principle of Button and its progeny was recently affirmed in In re Primus, 436 U.S. 412 (1978), where the Court reversed the disciplining of an attorney who advised a lay person of her legal rights concerning her sterilization. Counsel had sent a letter offering free legal assistance on behalf of the American Civil Liberties Union, a non-profit orginization with which the lawyer was affiliated, in order to bring a class action. Primus understood Button and subsequent decisions as having established the principle that association and expression on behalf of litigation are fundamental First Amendment rights.

> "Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, this Court has required that 'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.'"

436 U.S. at 426, quoting Mine Workers, supra, 389 U.S. at 222. The Court rejected efforts to limit the group litigation principle, by declining to distinguish Button because the ACLU might benefit financially from the litigation by a possible statutory award of attorneys' fees. 436 U.S. at 427-431.[29/]

Petitioners, however, do not acknowledge the "fundamental" nature of the right. Their characterization of the "generalized first amendment concerns of parties and their counsel" (Br, p. 10) deprecates Button and its progeny, and blinks at reality. The right of association and expression for litigation is not some abstract

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29/ The Court ruled that "the ACLU's policy of requesting an award of counsel fees does not take this case outside of the protection of Button." 436 U.S. at 429. The opinion relied on the fact that the NAACP and the NAACP Legal Defense Fund (the organizations involved in Button) often request fees. The Court noted that "differences between counsel fees awarded by a court and traditional fee-paying arrangements ... militate against a presumption that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain rather than by its widely recognized goals of vindicating civil liberties." Id. at 429-430. For LDF lawyers, as well as ACLU

privilege of no significant moment: its denial infringes "the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7. In the instant case, prohibiting communication by plaintiffs and NAACP

29/ continued

lawyers, "[c]ounsel fees are awarded in the discretion of the court; awards are not drawn from the plaintiff's recovery, and are usually premised on a successful outcome." Id. at 430. The provision for statutory awards of attorney's fees from defendants distinguishes this litigation from contingency fee litigation in which fees are paid from the recovery. In the latter case, an incentive to enlarge the class may exist because of "the prospect of reducing [plaintiffs'] costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery." Deposit Guaranty Nat'l. Bank v. Roper, 445 U.S. 326, 338 n.9 (1980). Moreover, in civil rights cases the size of the class ordinarily has no bearing on the amount of fees, see, Zarate v. Younglove, 86 F.R.D. 80, 98 (C.D. Cal. 1980), which depends on statutory criteria. See, e.g., Copeland v. Marshall, 24 EPD ¶31,219 (D.C. Cir. 1980) (en banc); Northcross v. Board of Education, 611 F.2d 624, 632 et seq. (6th Cir. 1979), cert. denied, 100 S. Ct. 2999, 3000 (1980).

Legal Defense Fund counsel with potential class members impaired the plaintiffs' right to be "fairly represented," barred LDF attorneys from effectively prosecuting the action and from dissemination of critical information about the lawsuit and conciliation agreement to similarly situated black persons, and altogether denied the potential class "meaningful access to the courts." Button, 377 U.S. at 426. It is a "commonsense proposition" that such activity is protected. United Transportation Union v. State Bar of Michigan, supra, 401 U.S. at 580.[30/]

Petitioners argue that the Button principle does not apply because "the order was entered during ongoing litigation." Br, p. 29 n.29. This contention, like those rejected in the union

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30/ The purported conflict between the "competing values" of First Amendment command and a court's authority to impose broad prior restraint to protect against potential abuse (Br, p. 10) was resolved in Button and its progeny. "[W]e look at the [order] like we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down." United Transportation Union, supra, 401 U.S. at 581.

referral cases and In re Primus, seeks to distinguish Button on its facts. But the constitutional right, as this Court has repeatedly said, is a broad protection for "collective activity undertaken to obtain meaningful access to the courts," and "the basic right to group legal action." United Transportation Union, supra, 401 U.S. at 585 (emphasis added). Nothing in the nature of the right to associate for litigation suggests that it terminates with the filing of the action. Indeed, the practical need for communication to prosecute, advance and develop litigation increases rather than diminishes with the filing of an action. See part II of the argument.

Moreover, in the instant case the prohibited communications were with potential class members who had to make a choice to participate in the lawsuit or to accept back pay under the conciliation agreement. Such persons in substance are in the same position as the potential plaintiffs in Button, the union members in the post-Button cases, or the potential plaintiff in In re Primus. Congress has determined that when a civil rights plaintiff obtains relief "he does so not for himself alone but also as a 'private attorney-

general,' vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401, 402 (1968); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975). Congress has therefore provided the courts with broad remedial powers[31/] and has authorized awards of counsel fees to encourage private attorney general enforcement of civil rights.[32/]

The Button principle has been applied outside the civil rights and civil liberties areas.[33/]

31/ Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g). See, Franks v. Bowman Transportation Co., 424 U.S. 747, 763-764 (1976).

32/ Section 706(k) of Title VII, 42 U.S.C. §2000e-5(k); Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988. See, Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Newman v. Piggie Park Enterprises, Inc., supra; see generally, S. Rep. No. 94-1011, The Civil Rights Attorneys' Fees Awards Act of 1976, 94th Cong., 2d Sess. (1976).

33/ See, Brotherhood of Railroad Trainmen, supra (Safety Appliance Act and FELA); United Mine Workers, supra (state workers' compensation law);

The instant litigation therefore is well within the core of protected activity.

B. The Orders Infringe Upon First Amendment Rights Without Requisite Proof Of Misconduct.

1. Absence of Proof of Misconduct

At a minimum, the First Amendment rights at stake cannot be infringed without proof of

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33/ continued

United Transportation Union, supra (FELA). Although this Court need not decide the question, the right of associational activity in support of litigation should apply to any controversy proper for judicial resolution. Although this is an action for equitable relief, and not a damage suit, there is no distinction for purposes of associational rights since either form of relief may constitute proper enforcement of public policy. See, Button, supra (equitable school desegregation action); Brotherhood of Railroad Trainmen, supra; United Mine Workers, supra; United Transportation Union, supra; In re Primus, supra (damage suits).

specific misconduct. However, "[n]othing that this record shows as to the nature and purpose of NAACP [Legal Defense Fund] activities permits an inference of any [conduct] injurious" to the processing of the lawsuit. NAACP v. Button, supra, 371 U.S. at 444.[34/]

Reciting "potential abuse" cannot cure the constitutional defect.

> "[L]aws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within ... [governmental] competence, or even because the laws do in fact provide a helpful means for dealing with such an evil."

United Mine Workers, supra, 389 U.S. at 222. "Rights of political expression and association may not be abridged because of ... interests asserted by appellate counsel without substantial

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34/ Accord, United Transportation Union, supra, 401 U.S. at 584 ("The record is devoid of any evidence or allegation of ['practicing law'] on the part of the Union or its members. A decree must relate specifically and exclusively to the pleadings and proof.").

support in the record or findings of the ... court." In re Primus, supra, 436 U.S. at 434, n.27. The application of narrowly drawn rules is proper "to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." Id. at 438 (emphasis added).[35/]

"[T]o the extent that the district court is empowered to restrict certain communications in order to prevent frustration of the provisions of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened." Coles v. Marsh, supra, 560 F.2d at 189 (decided on Rule 23 grounds).[36/] Not only

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35/ Accord, Richmond Newspapers, Inc. v. Virginia, supra, 65 L.Ed.2d at 992; First National Bank of Boston v. Bellotti, 435 U.S. 765, 789-790 (1978); Wood v. Georgia, 370 U.S. 375, 388 (1962); Bridges v. California, 314 U.S. 252, 271 (1941).

36/ Compare, JA 271-272 (Tjoflat, J., specially concurring in the decision of the Fifth Circuit en banc):

> "[I]ssuance of an order .. without an adequate statement of the reasons for the order does not meet minimum standards of procedural

did petitioners here not present any proof of misconduct or threatened misconduct, they did not specify any discrete harm at all to the processing of the class action. All that was relied on were unspecific and speculative claims of "threatened abuse" and "misrepresentation." See, supra at pp. 14-19.

Indeed, the only harm to the class action was done by the orders barring communications. See, JA 213-214 (Godbold, J., dissenting from the panel decision).

2. The Manual for Complex Litigation

Nor can the vacuum caused by the absence of specific factfinding be filled by the recommendations of the Manual, which asserts that association and expression may be restrained across-the-

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36/ continued

> fairness and regularity ... Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion."

Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978) (citations omitted).

board in every class action notwithstanding the circumstances in a particular case. The Manual, at 31, concludes that broad prior restraint may be imposed because the class action is subject to "abuse", intentional or inadvertent. It argues therefore that procedures should be employed to anticipate abuse. The Manual concedes that abuses are "the exceptions in class action litigation rather than the rule" and are "relatively rare." Id. at 36-37. See, supra at p. 32, n.25.37/

Indeed, the Manual speaks throughout of mere "potential abuses," rather than actual or imminent

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37/ "[T]he hypothesis that abuses occur with such frequency and impact that prophylactic judicial intervention is required must be examined with the same scrutiny as other factual hypotheses. Neither the Constitution nor the judge's duty of constitutional fact finding is subsumed by the application of the pejorative word 'abuse.' Not everything that tends to make a class action less convenient than ideal, or more difficult to manage is an 'abuse'.... The frequency and the effect of genuine abuses in class actions in general are not revealed by any empirical data made known to us, and judges may differ widely in their invididual assessments."

abuse, as justifying restraint of fundamental First Amendment freedoms. When protected speech is alleged to threaten the administration of justice or the court's integrity, "'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished'"; a "'solidity of evidence' ... is necessary to make the requisite showing of imminence"; and "'[t]he danger must not be remote or even probable, it must immediately imperil.'" Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978); Craig v. Harney, 331 U.S. 367, 376 (1947); Wood v. Georgia, supra, 370 U.S. at 384, 393. See, Chicago Council of Lawyers v.

37/ continued

(JA 262-263) (Fifth Circuit en banc).

The Manual's recommended restrictions on communications have been critically analyzed. See, Comment, Judicial Screening of Class Action Communications, 55 N.Y.U. L. Rev. 670 (1980) (forthcoming); Comment, Restrictions on Communication by Class Action Parties and Attorneys, 1980 Duke L. J. 360; Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920 (1978); Wilson, Control of Class Action Abuses Through Regulation of Communications, 4 Class Action Rpts. 632 (1975); 88 Harv. L. Rev. 1911 (1975).

Bauer, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). The standard is higher still for prior restraint.

The Manual identifies four potential abuses: (1) solicitation of legal representation; (2) solicitation of funds and agreements to pay fees and expenses; (3) solicitation by defendants of requests by class members to opt out in Rule 23(b)(3) class actions; and (4) unauthorized direct or indirect communications which "may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice." Manual at 31-32. However, the record does not demonstrate that any of these abuses occurred or was likely to occur in this case.

Three of the potential abuses, indeed, are totally inapplicable to the particular circumstances here. With respect to solicitation of legal representation, and of funds and agreements to pay fees and expenses, the uncontradicted affidavits of plaintiffs' counsel show that they

have not and will not solicit clients or funds. See, supra at pp. 11-13, 19.[38/] With respect to the third potential abuse, a prohibition of communications by defendants soliciting opt-out requests in Rule 23(b)(3) class actions does not apply to communications by plaintiffs in this Rule 23(b)(2) action. Thus, only the potential for misrepresentation is even arguably applicable to this case. But there is no proof that any misrepresentation was ever made or even threatened.

Indeed, even if one of these "potential abuses" had been demonstrated, there is substantial doubt that it would have justified the gag orders issued here, particularly in light of legal developments since the original promulgation of the Manual in 1970.[39/] Recent decisions of this

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38/ Counsel already represent plaintiffs who assert that they can adequately represent the interests of the potential class, and are providing representation at no cost to plaintiffs and the potential class. The only attorney's fees to which counsel may be entitled would be paid by defendants through taxation of costs by the court if plaintiffs prevail. Id.

39/ The terms of the suggested order and local rule have remained the same since the publication of the original Manual for Complex and Multi-

Recent decisions of this Court now establish that solicitation of legal representation, at least in some forms, is constitutionally protected activity. In re Primus, supra; Bates v. State Bar of Arizona, 433 U.S. 350 (1977).[40/] Instead of an across-the-board approach to prohibition of solicitation, the Court has thus confirmed that anti-solicitation measures must be adjudicated on a case-by-case basis. Even prior to 1970, NAACP v. Button and the union referral cases recognized that solicitation of legal representation is not per se unethical.[41/]

39/ continued

district Litigation, 49 F.R.D. 217, 229-230 (1970), except for the last two sentences concerning "communications protected by a constitutional right," which were added in a 1973 revision. Manual for Complex Litigation, Part II, §1.41, at 226 (1973).

40/ See also, Coles v. Marsh, supra; Halverson v. Convenient Food Mart, Inc., supra.

41/ See also, ABA Comm. on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957), discussed supra at p. 36, n.27. Solicitation of potential class members is permissible under the ABA Code of Professional Responsibility, DR 2-104(a).

As to solicitation of fees and expenses, since the Manual's suggested order and rule were drafted, "the Court has subsequently understood Cantwell [v. Connecticut, 310 U.S. 296 (1940)] to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 761 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977)." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980).[42/] Moreover, the ABA Committee on

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41/ continued

(1), providing that a lawyer may accept employment generated by his unsolicited advice from "one whom the lawyer reasonably believes to be a client," and under the ethical rule that a lawyer whose client will benefit from joinder of others similarly situated may seek out such additional claimants, if the lawyer's motive is not to secure additional fees. See, Halverson v. Convenient Food Mart, Inc., supra, 458 F.2d at 930-931 and authorities cited.

42/ Even prior to 1970, "our cases long have protected speech even though it is in the form of ... a solicitation to pay or contribute money,

Professional Ethics has determined that this kind of solicitation is also not invariably unethical.[43/]

With respect to solicitation by defendants of requests by class members to opt out of Rule 23(b)(3) actions, recent authority is divided as to whether such solicitation is unethical in the absence of demonstrated coercion or fraud.[44/]

42/ continued

New York Times Co. v. Sullivan," [376 U.S. 254 (1964)]." Bates v. State Bar of Arizona, supra, 433 U.S. at 363; Village of Schaumburg, supra, 444 U.S. at 633.

43/ Thus, it is permissible for a class representative to solicit money from potential class members to cover the expenses of a suit, II ABA Comm. on Professional Ethics, Informal Ethics Opinions, 537-540, Inform. Op. No. 1280, Aug. 8, 1973 (ABA 1975), and class action counsel are permitted to advance money to cover litigation costs. Id., at 544-547, Inform. Op. No. 1283, Nov. 20, 1973.

44/ Compare Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 69 (E.D N.Y. 1974), and Greisler v. Hardee's Food Systems, Inc., 1973 Trade Cases ¶ 74,455 (E.D. Pa. 1973), with Northern Acceptance Trust 1065 v. AMFAC, Inc., 51 F.R.D. 487, 491 (D. Hawaii 1971).

Assuming such a practice does raise ethical problems, specific remedies other than the Manual's blanket ban on communications are available, such as a remedial notice voiding improperly obtained opt-out requests.

As to communications which "may misrepresent" or "may create impressions tending, without cause, to reflect adversely on any party, any counsel, court or the administration of justice," the scope of this "potential abuse" is so vague and indeterminate that it necessarily includes protected and ethical communications. In Village of Schaumburg v. Citizens for a Better Environment, supra, the Court was of the view that a "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. With respect to lawyer misrepresentation, the "precise contours of permissible ... regulation" were deliberately not drawn in In re Primus, supra, 436 U.S. at 438 n.33, and 439-440 (Blackmun, J., concurring), other than to permit precise

regulation where there is "in fact" misleading solicitation. Moreover, "[g]iving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems," as long as the attorney is not "motivated by a desire to obtain personal benefit." ABA Code of Professional Responsibility, EC 2-3.[45/] The broad potential-for-misrepresentation prohibition, thus, may well invade the province of a lawyer's ethically proper communication.

The Manual, which is periodically updated, cites none of the recent authorities discussed above. It maintains instead that "experience continues to teach that it is dangerous to await the occurrence of an abuse before trying to correct it." Id. at 32 (Supp. 1978). The Manual, at 34, states that the recommended

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45/ See also, ABA Comm. on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957) (discussed supra at p. 36, n.27); see also, In re Sawyer, 360 U.S. 622, 631-632 (1959).

restrictions are the "result of unfortunate experiences where parties and counsel have abused the class action process," and then cites exemplary cases. However, none of the cases cited to document alleged abuse disclose a single instance of proven misconduct by plaintiffs or their counsel which would have been prevented by the suggested order or local rule. Manual, pp. 34-35 nn.34-42; see also, Br, p. 15 n.5.[46]

46/ Several cases concern restrictions based on a bare fear of potential abuse, rather than a situation which has "matured" into actual abuse. See, Ace Heating and Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971); N.O.W. v. Minnesota Mining & Mfg. Co., 18 FEP Cases 1176 (D. Minn. 1977), appeal dism'd, 578 F.2d 1384 (8th Cir. 1978). Others present no issue of abuse. See, Weisman v. Darneille, 78 F.R.D. 671 (S.D.N.Y. 1978); Northern Acceptance Trust 1065 v. AMFAC, Inc., 51 F.R.D. 487 (D. Haw. 1971). One case concerned an improper determination of abuse. Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972), rev'g, 1971 Sec. L. Rep. ¶92,845 (S.D. N.Y. 1971). In Korn, for example, the Second Circuit expressly refused to evaluate the propriety of the conduct of plaintffs' counsel in communicating with class members, but reversed the district court for condemning that conduct without giving the attorney adequate notice and hearing.

C. The Orders Impose Unconstitutional Prior Restraint on Protected Expression.

The comprehensive and detailed opinion of the Fifth Circuit en banc demonstrates the

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46/ continued

The gag orders are inapplicable in several cases. See, Reed v. Sisters of Charity of the Incarnate Word of Louisiana, Inc., 25 Fed. Rules Serv. 2d 331 (W.D. La. 1978); Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972), appeal dism'd, No. 72-1605 (5th Cir., June 23, 1972). For example, the gag orders could not reach the prefiling activity described in Carlisle (plaintiffs' attorney sought out people willing to have a class action instituted in their names as representatives of the class) or Reed (plaintiffs' counsel solicited institution of the suit during inflammatory speech).

Several cases demonstrate that there are less restrictive means to deal with possible abuses. See, Rothman v. Gould, 52 F.R.D. 494 (S.D. N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970) (the compromise of claims or solicitation by defendants of class members to opt

unconstitutionality of the orders as unjustified prior restraint of protected speech. (JA 241-267).[47/] Judge Godbold's opinion first

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46/ continued

out could have been remedied through the court's review of compromises under Rule 23(e)); Hawkins v. Holiday Inns, Inc., [1978-1] Trade Cases ¶61,838 (W.D. Tenn. 1978) (injunction and notice). Cf., Northern Acceptance Trust 1065 v. AMFAC, supra (efforts by defendants' counsel to obtain affidavits from members of a putative class indicating that they had not entered into any arrangements to be represented by plaintiffs' attorney, can be controlled by means of existing restrictions on communications by lawyers with persons having adverse interests). See, ABA Code of Professional Responsibility, DR 7-104.

Other "abuses" did no harm to potential class members, or to the management of the suit. See, e.g., Northern Acceptance Trust 1065 v. AMFAC, supra, and EEOC v. Red Arrow Corp., 392 F. Supp. 64 (E.D. Mo. 1974).

47/ Although the opinion speaks only of the June 22, 1976, order, the validity of all three orders is before the Court. See, supra at pp. 16, 20, 24. The June 22 order, in any event, is on its face the least restrictive of the three orders. A fortiori, the Fifth Circuit's opinion applies to the May 28 and August 10 orders as well.

scrupulously reviews and correctly applies this Court's cases in order to determine whether the orders constitute a system of prior restraint, looking to their origin, purpose, means of enforcement and means of constitutional challenge. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Near v. Minnesota, 283 U.S. 697 (1931). (JA 241-252). After determining that the restrained expression is protected, NAACP v. Button, supra; In re Primus, supra (JA 252-256), the opinion then conducts an inquiry into whether the prior restraint is justified in the face of "'the heavy presumption against its constitutional validity.'" Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 558, quoted in Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980). (JA 256-266). The court concludes that the orders (a) do not fit within any of the narrowly defined exceptions to the prohibition against prior restraint, (b) do not prevent "direct, immediate, and irreparable damage," New York Times Co. v. United States, 403 U.S. 713 (1971), in the least restrictive manner, and (c) do not comport with required procedural safe-

guards. The court therefore holds that the orders impose an unconstitutional prior restraint.

Because respondents submit that the en banc opinion's application of constitutional principles to this record is correct, we limit our discussion of prior restraint to replying to several arguments petitioners make against the en banc opinion.

First, petitioners argue that the orders are not a system of prior restraint because the June 22 order "allowed free exercise of speech without court approval" by virtue of the provision for asserting a constitutional right to communicate. Br, p. 32.[48/] Petitioners ignore com-

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48/ Petitioners cite Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), and Kingsley Books v. Brown, 354 U.S. 436 (1957), in support of their contention that a prior restraint analysis is inappropriate because, in petitioners' view, the orders are the result of "reconciling competing constitutional values" of freedom of speech and the administration of justice. Br, pp. 31-32. In Smith, a statute which made it a crime for a newspaper to publish, without written court approval, the name of any youth charged as a juvenile offender could not be justified even as a penal sanction under Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). 443 U.S. at

pletely both the May 28 order, which on its face was an absolute ban on communication, and the

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48/ continued

101, 102. "Since we conclude that this statute cannot satisfy the constitutional standard defined in Landmark Communications, Inc., we need not decide whether, as argued by respondents, it operated as a prior restraint." Id. Smith, therefore, does not support petitioners. See, e.g., Vance v. Universal Amusement Co., supra, 445 U.S. 316 n.13.

The language in Kingsley Books v. Brown, supra, 354 U.S. at 441, that prior restraint is not a "talismanic test," does not conflict with the presumption against prior restraints, the en banc opinion's meticulous analysis of the orders, or cases since Kingsley such as Southastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 558.

The prohibition against unjustified prior restraint does not somehow inhibit the reconciling of competing values. Rather, the presumption against prior restraint merely strikes the balance required by the First Amendment because "a free society prefers to punish the few who abuse

August 10 order, which, in fact, gutted whatever illusory exception for constitutionally protected speech existed in the June 22 order. The mere formal existence of an exception, in any event, is not enough to immunize a system of prior restraint. The Court has long deemed it necessary "to look through forms to the substance," Bantam Books v. Sullivan, 372 U.S. 58, 67 (1973),[49/] and not required that a provision "effect total suppression in order to create a prior restraint." Southeastern Promotions, supra, 420 U.S. at 556 n.8. See, Buckley v. Valeo, 424 U.S. 1, 52 (1976); Miami Herald Publishing Co v. Tornillo, 418 U.S. 241, 256 (1974); New York Times Co v.

48/ continued

rights of speech after they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 559.

49/ "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker before an adequate determination that it is unprotected by the First Amendment." Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 390 (1973) (emphasis added).

Co. v. Sullivan, 376 U.S. 254, 279 (1964).[50/]

Second, petitioners argue that the "exception" for constitutionally protected communication is "broad" and "limits severely the scope of the information subject to prior scrutiny." Br, p. 32. The June 22 order prohibits all communications, but ambiguously requires that a party or counsel who "asserts a constitutional right to communicate" file a copy of any written communication or a summary of any oral communication within five days after the communication. (JA 100, 101). In rejecting a similar effort to save an unconstitutional provision, the Court held that,

> "[i]f there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights."

50/ Contrary to petitioners' suggestion, Br, p. 32, Gannett Co. v. DePasquale, 433 U.S. 368, 393 (1979) ("any denial of access in this case was not absolute but only temporary") (emphasis added), does not require an absolute ban to trigger prior restraint analysis.

NAACP v. Button, 371 U.S. at 438. The district court's August order, in any event, demonstrates why courts "will not presume that the statute curtails constitutionally protected activity as little as possible." Id. at 432.

"Standards of permissible statutory vagueness are strict in the area of free expression." Id. The extent of the protection accorded by the otherwise undefined exception is uncertain and provides no notice of what is permitted or prohibited. "This provision does not eliminate--indeed, it highlights--the overbreadth and resultant chilling effect of the proposed rule." 88 Harv. L. Rev. 1911, 1922 n.74 (1975). The exception itself is unconstitutionally vague.[51/] The system of prior restraint imposed by the orders thus will work its harm by compelling parties and counsel to "steer far wider of the

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51/ Hirschkop v. Snead, 594 F.2d 356, 372-373 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 259 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); CBS, Inc. v. Young, 522 F.2d 234, 239-240 (6th Cir. 1975); Zarate v. Younglove, 86 F.R.D. 80, 101 (C.D. Cal. 1980).

unlawful zone." Speiser v. Randall, 357 U.S. 513, 526 (1958), quoted in New York Times Co. v. Sullivan, supra, 376 U.S. at 279. Neither the orders nor the exception in the June 22 order is "'closely drawn to avoid unnecessary abridgement of associational freedoms.'" In re Primus, supra, 436 U.S. at 432, quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976).[52]

52/ The filing requirement increases the harm. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958). The filing requirement extends to every communication, including communication protected as attorneys' work product. See, Hickman v. Taylor, 329 U.S. 495 (1947). "To the extent that such communications contain information as to class counsel's view of the case or the decisions of class counsel as to tactics or strategy, the failure to serve the party opposing the class makes the communications an ex parte contact with the court which infringes the rights of the defendant, but service of the communication on the party opposing the class would give the class opponents the benefits of discovery in areas which are normally privileged." Seymour, The Use

The related claim that the exception allows constitutional challenge to restraint as a defense to criminal contempt, Br, p. 33, is adequately disposed of by the dissent to the panel opinion[53/]

52/ continued

of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920, 942 (1978).

53/ "The majority's conclusion that the assertion of a good faith belief gives total protection is disingenuous. The district court would still be entitled to inquire into the bona fides of counsel's belief. Because counsel may be called upon to establish the basis for his good faith belief, and therefore is put at risk for possibly violating the court's order, the good faith exception does not ameliorate the chilling effect of the order. It is little comfort for a conscientious attorney to be told that he may communicate with potential class members but that at a later time may be called upon by the court to justify the communication. Even if facially a cure, the constitutional exception is no cure as applied to these plaintiffs who prudently asked for pre-distribution approval of the leaflet reproduced [as Addendum B] rather

and by the en banc majority opinion.[54/] Systems of prior restraint with similar formalistic but ineffective "safety valves" have been struck down because the system in operation "'dampens the vigor and limits the variety of public debate.'" Miami Herald Publishing Co. v. Tornillo, supra, 418 U.S. at 257. See, supra at p. 64.

The rule proposed by petitioners in practice is unworkable as a matter of fairness and judicial economy. If, as petitioners suggest, an immediate appeal of a finding of contempt is required every time there is restraint, prosecution of the lawsuit on the merits will be handicapped and the appellate courts will be inundated with cases requiring supervision of minute details of barred class communication. If, on the other hand,

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53/ continued

> than risk post-distribution filing and were given a belated denial."

(JA 227-228) (footnotes omitted).

54/ The "good faith" defense "is not found within the order but was read into it by the panel majority", and "[e]ven if this construction is correct, the defense is so freighted with preconditions and uncertainties that it is little comfort to attorney or party ..." (JA 250-252).

plaintiffs and their counsel are required to remain silent pending final judgment before obtaining appellate review, their rights to free expression and association often will be irretrievably lost. It will soon be five years since the communication orders below were issued. If plaintiffs prevail on appeal, retrial may be necessary. Finally, if plaintiffs and their counsel simply ignore the court's order and exercise their First Amendment rights, they may be precluded from asserting those rights on appeal at all. See, Walker v. City of Birmingham, 388 U.S. 307, 316-317 (1967). In any event, the harm worked by the orders on a fundamental right of meaningful access to the courts will have been done.

D. The Orders Are Overbroad.

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.
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> "Broad prophylactic rules in the area of free expression are suspect. ... Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

NAACP v. Button, supra, 371 U.S. at 433, 438; In re Primus, supra, 436 U.S. at 432-433; Nebraska Press Association v. Stuart, supra, 427 U.S. at 568; Village of Schaumburg v. Citizens for a Better Environment, supra, 444 U.S. at 637.[55/] In Button and In re Primus, this principle was applied to strike down similarly broad prohibitions of alleged solicitation by attorneys engaged in civil rights and civil liberties enforcement actions.[56/] Even a legitimate governmental

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55/ See, In re Halkin, supra, 598 F.2d at 193-194; Hirschkop v. Snead, supra, 594 F.2d at 373; Chicago Council of Lawyers v. Bauer, supra, 522 F.2d at 257-259.

After its analysis of the order as a prior restraint, the en banc majority stated that "the unconstitutionality of the order does not rest on that ground alone. Even under the more relaxed analysis accorded subsequent restraints the order fails to pass constitutional muster." (JA 266-267 n.33).

56/ In In re Primus, the Court stated that,

> "At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching,

purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The district court's orders simply are not "narrowly drawn regulations designed to serve [legitimate] interests without unnecessarily interfering with First Amendment freedoms." Village of Schaumburg v. Citizens for a Better Environment, supra, 444 U.S. at 637. The majority en banc opinion was clearly right that "[i]t is obvious that overbreadth is inevitable under a system by which plenary restraints are imposed automatic-

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56/ continued

> conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973). See Ohralik [v. Ohio State Bar Assn., 436 U.S. 447] at 455-459. In the context of political expression and association, however, a State must regulate with significantly greater precision."

In re Primus, supra, 436 U.S. at 437-438.

ally by rule or order in every actual or potential class action." (JA 264 n.32). The communications orders operated as a blanket prohibiton, and included in their coverage the very kind of activity legitimated in Button and In re Primus.

The orders clearly transgressed the requirement that "'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.'" In re Primus, 436 U.S. at 426, quoting Mine Workers, supra, 389 U.S. at 222. The terms of the May 28 prohibition were all-inclusive, and the August 10 order was directly aimed at protected expression. The provision in the June 22 order for assertion of a constitutional right to communicate on pain of criminal contempt does not save the orders from overbreadth. NAACP v. Button, supra, 371 U.S. at 437-438. See, supra at pp. 65-67. "First Amendment interests are fragile interests, and a person who contemplates protected activities might be discouraged by the in terrorem effect of the statute." Bates v. State Bar of

Arizona, supra, 433 U.S. at 380; see, Nebraska Press Association v. Stuart, 427 U.S. 539, 568 (1976).

II

THE ORDERS RESTRAINING COMMUNICATIONS VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Due Process Clause Guarantees Plaintiffs and Potential Class Members Significant Procedural Rights.

The district court restricted the right of plaintiffs and plaintiffs' counsel to communicate with potential class members, permitted certain communications between Gulf and potential class members, denied a specific request by plaintiffs' counsel to communicate, and instructed the court clerk to send the class members a notice regarding Gulf's offer of settlement. These actions deprived plaintiffs and potential class members of their rights guaranteed by due process of law.

> "The constitutional right to due process is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his

> possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivation of property ...."

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

The protection of property afforded by the requirements of due process "has been broadly read to extend protection to 'any significant property interest,'" id., 407 U.S. at 86, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971), including statutory entitlements, "whether the entitlement is denominated a 'right' or a 'privilege'." Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The right to equal employment opportunity and freedom from discrimination created by Title VII is "of the 'highest priority'," Alexander v. Gardner-Denver Co. 415 U.S. 36, 47 (1974), and casts private litigants and their counsel in a central enforcement role. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-417 (1978).

Due process may not be ignored to satisfy concerns for efficiency or for the expeditious resolution of disputes.

> ".. [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the ... Due Process Clause... that [it was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted).

The "shortcut" procedure followed by the district court, as is the case with many procedural shortcuts which ignore due process, may result in much more complex, lengthy and uncertain litigation. Cf., Hansberry v. Lee, 311 U.S. 32 (1940); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). If the waivers of potential class members' rights under the fair employment laws were solicited by Gulf in a manner which precluded the class members from making a "knowing and voluntary" choice because they were presented with one-sided, inadequate information and denied the effective assistance of counsel, then those waivers would not bar further litigation on

behalf of the class members who signed them.[57] See, Alexander v. Gardner-Denver Co., supra, 415 U.S. at 52 n.15. In fact, in fair employment cases, where "laymen, unassisted by trained lawyers, initiate the process," Love v. Pullman Co., 404 U.S. 522, 527 (1972), the possibility that conciliation procedures may deny individuals due process is of particular concern.[58]

57/ The possibility that future litigation may provide a remedy for the class members who did not knowingly or voluntarily sign the waiver does not remove the obligation to insure that the district court afforded due process during the period of solicitation of waivers. "... [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right to procedural due process has already occurred. 'This Court has not ... embraced the general propositon that a wrong may be done if it can be undone.'" Fuentes v. Shevin, supra, 407 U.S. at 81-82, quoting Stanley v. Illinois, 405 U.S. 645 (1972).

58/ See, e.g., Mosley v. St. Louis Southwestern Ry., 634 F.2d 942, 945-946 (5th Cir. 1981) (court invalidated waiver because an EEOC official failed to present settlement to plaintiff's attorney, but rather presented offer directly

B. Adequate Information Was Denied.

It is fundamental that due process of law requires the right to information, or "notice and an opportunity to be heard [which] 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, supra, 407 U.S. at 80, quoting Armstrong v. Manzo, 380 U.S. 545 (1965). Moreover, "... when notice is a person's due, process which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

The orders here stand the Mullane formula on its head. Gulf, the party which has an interest antagonistic to potential class members, was afforded a central role in providing them with notice and information concerning the conciliation agreement, while the plaintiffs, who have essen-

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58/ continued

to the charging party); Winfield v. St. Joe Paper Co., 20 FEP Cases 1103, 1108-14 (N.D. Fla. 1979) (court invalidated waivers because the EEOC officials had provided misleading and inadequate information).

tially the same interest as the class members, and plaintiffs' counsel, who have a legal obligation to represent the interests of the class members, 59/ were prevented from communicating with the potential class.

59/ Gulf states that "it appears that the attorney-client relationship between counsel for the named plaintiffs and purported class members is created when the court certifies the class and designates the class representative and his counsel." Br, p. 19, n.12 (emphasis added). Contrary to Gulf's supposition, class counsel are ethically obligated to take all actions necessary for the protection of the interests of a class member until the class member elects to place his or her personal claim in the hands of another attorney. "[C]lass action counsel possess, in a very real sense, a fiduciary obligation to those not before the court." Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973) (footnote omitted). Therefore, the failure to appeal a denial of class certification has been described as an "abdication" of responsibilities. Romasanta v. United Airlines, Inc., 537 F.2d 915, 918, 919 (7th Cir. 1976), aff'd sub nom. United Airlines v. McDonald, 432 U.S. 385 (1977). See Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920, 928-929 n.64 (1978).

Pursuant to the conciliation agreement, Gulf prepared and sent a letter dated May 1, 1976[60/] to covered persons. The May 1 notice stated that if an employee did "not understand" Gulf's offer, the employee should contact a Gulf manager, C.B. Draper, in order to "arrange an interview with a government representative." The letter specifically discouraged the employee from consulting with any other person, including an attorney: "Because this offer is personal in

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59/ continued

The attorney for the class has an obligation to ensure that the interests of all the class members are protected. Accordingly, the inquiry under Rule 23(a)(4), Fed. R. Civ. Proc., as to whether "the representative parties will fairly and adequately protect the interests of the class" focuses upon the "adequacy" of the attorneys for the class. North American Acceptance v. Arnall, Golden & Gregory, 593 F.2d 642, 644, n. 4 (5th Cir. 1979); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3d Cir.), cert. denied 421 U.S. 1011 (1975). The obligation of the class attorney commences with the filing of the complaint and not just with the certification of the class by the court.

60/ This letter is attached to this brief as Addendum A. See, supra, p.6, n.7.

nature, Gulf asks that you not discuss it with others."

The order of June 22 sanctioned the one-sided presentation of information to potential class members. See, supra at 20-22. It specifically permitted Gulf to contact potential class members through the district court for the purpose of offering "back pay" settlements and soliciting releases. The district court ordered that a notice be sent to class members who had failed to accept Gulf's offer. The notice not only improperly gave "the official imprimatur of the court," (JA 216) (panel opinion, Godbold, J., dissenting), to the making of settlement offers and solicitation of releases by Gulf, but also failed to notify black employees of the availability of class counsel or even of the possibility of obtaining independent legal advice.

Under the June 22 order, company officials and supervisors were also free to discuss the case with their black employees and to offer their views on subjects ranging from the adequacy of the company's conciliation agreement and settlement offers to the reputation of plaintiffs' counsel. As long as these discussions "occurr[ed] in the regular course of business," they were not subject

to any regulation by the court. This was an opportunity for access to potential class members which plainly was not available to plaintiffs and their counsel, and it was open to widespread and unreviewable abuse in the context of the employer-employee relationship.

The unfairness of the procedure was exacerbated by the court's subsequent denial of plaintiffs' request that they and their counsel be permitted to communicate with class members and to distribute a leaflet within the time period for responses to the tender of back pay. The leaflet notified black employees of the existence of the lawsuit as an alternative to acceptance of Gulf's offer and urged them to talk to an attorney. Addendum B. The district court waited until two days after the period for acceptance of the tender offer and then prohibited the distribution of the leaflet and denied the right to communicate. See, supra at p. 24.

The restrictions on communications were so unfair and one-sided, and the failure to provide for or to permit adequate notice and information was so contrary to the requirements of Mullane and

Fuentes, that they constitute a denial of due process of law in violation of the Fifth Amendment. Cf., JA 213-216 (Godbold, J., dissenting from the panel decision). In addition, the orders violate the due process clause because they constitute a federally-imposed discrimination which, if enforced by a state, would violate the equal protection clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954); Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974).[61]

C. Effective Assistance of Counsel Was Denied.

The right to notice, adequate information and an opportunity to be heard, "'would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel....' Counsel

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61/ "The right to equal protection of the law in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has firmer foundation that the whims or personal opinions of a local governing body." Niemotko v. Maryland, 340 U.S. 268, 272 (1951); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); cf. Cox v. Louisiana, 379 U.S. 559, 581 (1965) (Black, J., concurring); see also, Cox v. Louisiana, 379 U.S. 536, 557 (1965).

can help delineate the issues ... and generally safeguard the interests of the [class members]." Goldberg v. Kelly, 397 U.S. 254, 270 (1970). Counsel may provide the necessary information and advice which will give "reality [and] worth" to the right to be heard by providing the class member adequate information in order that he may "choose for himself whether to appear or default, acquiesce or contest." See, Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 314. The plaintiffs and their black coworkers have a right "to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7 (1964). The free and private flow of communications between these workers and the attorneys representing their interest must be protected because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf., Gideon v. Wainwright, 372 U.S. 335." Id.[62/]

62/ The right to retain counsel and to be heard by counsel in civil litigation is implicit in the concept of Fifth Amendment due process. "If in

Due process may not require the appointment of counsel, even where, as here, important civil rights are at stake, but due process does require that district courts not arbitrarily or unfairly restrict the right of potential class members to class counsel who are available and obligated to represent their interests. Not only did the orders prohibit communication between the class counsel and potential class members, but the orders prohibited notice, as requested by plaintiffs, that class counsel were available for consultation or that other attorneys might assist them in making a determination whether or not to accept Gulf's offer of back pay.[63/]

62/ continued

any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added); Cooke v. United States, 267 U.S. 517, 537 (1925); Potashnick v. Port City Construction Co., 609 F.2d 1101, 1118 (5th Cir. 1980). See also, Note, The Right To Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966).

63/ "The order permits a potential class member to confer with attorneys for plaintiffs at the

The infringement upon potential class members' access to effective assistance of counsel is particularly egregious in this case. Access was denied during a period when potential class members were required to make a decision on whether or not to accept Gulf's back pay offer[64/] and waive their right to litigate their civil rights claims. The orders magnified the harm created by Gulf's erroneous and self-serving

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63/ continued

prospective class member's request. Pragmatically, this is a dubious exception. A prospective class member must find out who the attorneys are and when and where to see them; but the actual class members are forbidden to give him this information -- or any other information about the case -- without prior court approval, nor can counsel furnish this information to potential class members generally." (JA 214) (Goldbold, J., dissenting from the panel decision).

64/ The offer also included the acceptance of certain injunctive remedies. See, supra at pp. 4-5. Incredibly, neither the letter prepared and sent by Gulf, Addendum A, nor the notice sent by the court, JA 103-104, mentioned the injunctive remedy or otherwise discussed the remedies provided by the conciliation agreement. Moreover, no information was provided as to whether or not more or different injunctive remedies might be available if the offer were refused and the claims litigated.

instruction to the class members -- that a potential class member's claim should not be discussed with "anyone." Without the assistance of professional advice, a potential class member could not be expected to have the experience and sophistication to fully understand the complex choice provided by the back pay offer. Both this Court, Love v. Pullman, supra, 404 U.S. at 526-527, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979), and Congress have observed that "aggrieved individuals [under Title VII] ... frequently are untrained laymen who are not always aware of the discrimination which is practiced against them..." Section-by-Section Analysis of S. 2515, the Equal Employment Employment Opportunity Act of 1972, 118 Cong. Rec. 940-941 (1972). Respondents submit that, rather than restricting the contact of lawyers in Title VII class actions with class members, justice and the policies of Title VII would be better served by requiring lawyers to have sufficient contact with class members to insure fair and full representation of their interests.[65/]

65/ Congress has recognized the critical role of private counsel in enforcing the policy of Title

The denial of the effective assistance of counsel did not stop when the period for consideration of Gulf's settlement offers terminated. The district court's orders continued to impair severely the ability of plaintiffs' counsel to provide proper representation to the plaintiffs and to the potential class members.

The Manual, at 34, recognizes that class members often have knowledge of the relevant facts and that "to require a party to develop the case without contact with such witnesses may well constitute a denial of due process." However, plaintiffs and their counsel were not permitted to contact and interview black employees who had knowledge of the facts, whose experience and assistance were necessary in framing litigation

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65/ continued

VII and protecting the rights of individuals by providing that a court should ordinarily award attorneys' fees to a prevailing plaintiff, see Christiansburg Garment Co. v. EEOC, supra, and by providing that "the court may appoint an attorney for [a] complainant," 42 U.S.C. §2000e-5(f)(1). See, e.g., Caston v. Sears, Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977); Hilliard v. Volcker, 24 FEP Cases 1516 (D.C. Cir. 1981).

and settlement strategy, and who were potential witnesses, unless they first obtained the court's approval of both the proposed communication and its intended recipients.[66/] If the court approved, plaintiffs' counsel were required to conduct countless limited interviews; any meaningful exchange or discussion would have been impossible, since counsel were permitted to ask only approved questions and were not allowed to follow up on new information revealed by the class members' answers. There was no corresponding restraint on defendants and their counsel: Gulf's lawyers were free to consult with management and supervisory employees to develop the facts, interview witnesses, prepare for trial, and discuss strategy without any restrictions whatever.

The restraints on communication denied effective assistance of counsel to the class members. See, Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7. Interference with an employee's right to discuss the case with an attorney representing his interests, without

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66/ The assertion of a "constitutional right to communicate" under the June 22 order provides no real protection. See supra at pp. 62-70.

the fact of that discussion being known to his employer, may destroy the right to consult a lawyer at all. Cf., NAACP v. Alabama, supra, 357 U.S. at 462. Moreover, plaintiffs' counsel are effectively deprived of the opportunity to canvass employees for relevant data, to learn the desires and attitudes of class members regarding proposed forms of relief, and most importantly, to obtain information from employees who are too timid to aid plaintiffs publicly. This Court has recognized the importance of confidential communications between employees and their representatives in litigation.

> "The danger of witness intimidation is particularly acute with respect to current employees--whether rank and file, supervisory, or managerial--over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, due to the 'peculiar character of labor litigation[,] the witnesses are especially likely to be inhibited by fear of the employer's or--in some cases--the union's capacity for reprisal and harassment.' Roger J. Au & Son, Inc. v.

> NLRB, 538 F.2d 80, 83 (CA3 1976). Accord, NLRB v. Hardeman Garment Corp., 557 F.2d 559 (CA6 1977). While the risk of intimidation (at least from employers) may be somewhat diminished with regard to statements that are favorable to the employer, those known to have already given favorable statements are then subject to pressure to give even more favorable testimony."

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 240 (1978). Cf., 42 U.S.C. § 2000e-3(a) (unlawful for employers to retaliate against employees who invoke Title VII or who assist or participate in Title VII proceedings); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

Plaintiffs and their counsel are deprived even of the basic right to conduct private interviews of potential witnesses in preparation for trial. The June 22 order ignores the settled principle that such interviews are part of an attorney's work product and as such are not subject to forced disclosure unless the opposing party makes a specific showing of undue hardship or prejudice. Hickman v. Taylor, 329 U.S. 495 (1947). The Second Circuit has reversed a district court's order which forbade counsel to interview adverse witnesses except in the presence of opposing counsel or a stenographer who could

make a transcript of the interview available to the court. The court recognized, relying on Hickman, "the legitimate need for confidentiality in the conduct of attorneys' interviews, ...[and] maximizing unhampered access to information ... [in order to] insur[e] the presentation of the best possible case at trial." IBM Corp. v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975). The Second Circuit regarded it as

> "a disservice both to the parties and to the Court to subject to the Court's scrutiny the process by which counsel researches, develops and integrates the case which he ultimately presents.... To require that his initial investigatory efforts be of a quality which counsel would willingly include as part of his client's final case is to set up an impossible standard; to ask him to submit his initial probings, notwithstanding their lack of effectiveness in his client's behalf, is in effect to ask counsel to deny his client the effective representation to which he is entitled. See, Code of Professional Responsibility, Canon 7."

526 F.2d at 42. The Second Circuit therefore held that the restrictions unduly infringed counsels' ability to prepare the case for trial and impaired the constitutional right to effective assistance of counsel. Id.

The court's order in the instant case denies even more fundamental rights: it imposes unconsti-

tutional retrictions not simply on private interviews with an opposing party's witnesses, but on interviews by plaintiffs' counsel with their own prospective witnesses. By requiring prior disclosure and approval by the court of both the identity of potential witnesses and the substance of proposed interviews, the order destroys the confidentiality of those interviews and thus deprives plaintiffs and their class of an essential element of effective representation by counsel.

D. An Adequate Hearing and Procedural Regularity Were Denied.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard...' Baldwin v. Hale, 68 U.S. 223, 233...." Fuentes v. Shevin, supra, 407 U.S. at 80. Due process permits a variance in the form and scope of a hearing "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 313; Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). But the Court has "traditionally insisted

that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." Fuentes v. Shevin, supra, 407 U.S. at 82.

In support of its motions requesting restrictions on communications, Gulf relied upon unverified statements of unnamed informants who asserted that plaintiffs' counsel engaged in "improper" conduct. These statements were rebutted by sworn statements of plaintiffs' counsel denying the unsworn hearsay. The district court explained neither the factual nor the legal basis for its orders; the court did not issue findings of fact or conclusions of law.[67/] "[I]ssuance of an order ... without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity." Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). See, supra at part I B of the argument.

67/ Gulf, recognizing the indefensibility of the unexplained orders, speculates as to the legal reasoning of the lower court. Gulf states that "[a]fter assuring itself that the conciliation agreement provided complete relief (JA 71-80), the district court granted the request [made by Gulf] to resume the conciliation process ... " Br, p. 25. First, there is nothing in the record to suggest that the court reviewed the

Finally, the district court even failed to timely consider the plaintiffs' motion to communicate with class members during the period when Gulf made its back pay offers and solicited waivers. It is unnecessary in this case to indicate the precise form of hearing which due process requires in these circumstances. See,

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67/ continued

conciliation agreement or the applicable law, much less that it "assured itself" that the "agreement provided complete relief." Second, in support of its assertion Gulf refers merely to the conclusory statements of government officials; facts regarding the sufficiency or lack of sufficiency of the agreement were never presented to the court. Third, the agreement standing by itself raises considerable doubt as to whether or not it provides full relief. See, supra, pp.7-8, n.8.

For example, the affirmative action provisions appear to lock in discrimination. The agreement provides for a "goal" to fill one of every five vacancies in some "target classifications" and one of every seven vacancies in other such classifications with "a Negro, a Spanish-surnamed American or a female." See, supra, pp. 4-5, n.5. Gulf may meet these goals through hire or promotion. Id. It is clear that the ratio for "affirmative action" selection, 20% or 14%, is substantially below the level of blacks, Spanish-surnamed Americans and women in the relevant labor force. This is true regardless of how the appropriate labor market is defined, as demonstrated by

supra, at pp. 93-94. Under any possible standard, the procedures followed by the district court

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67/ continued

the following table.

	% Minorities and Women	% Blacks	% SSA	% White
SMSA Workforce	46.37	18.9	3.75	23.72
SMSA "Blue Collar"	27.11	19.9	4.18	3.03
Port Arthur Workforce	59.49	34.58	6.13	18.78
Port Arthur "Blue Collar"	47.10	37.43	6.96	2.71

SOURCE: U.S. Bureau of the Census, 1970 Census of Population, General Social and Economic Characteristics, PC (1) - (45) (Texas), Table 86 at pp. 542-543, Table 93 at pp. 633-634, Table 99 at pp. 711-712 ("Blue Collar" includes persons listed as "craftsmen, foremen and kindred workers," "operatives, except transport and equipment operatives" and "laborers, except farm").

Thus the proportion of blacks, Spanish-surnamed Americans and women in the possible relevant workforces for the production and maintenance jobs varies from 27.11% to 59.49%. There was no explanation presented to the district court, or to the black workers, for the "affirmative action goals" of 14% or 20% which were, in fact, substantially below the proportion of blacks, Hispanics and women which would be expected to fill Gulf's jobs even in the absence of affirmative action.

failed to conform to due process.

III

THE ORDERS ARE INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE. 68/

The source of the district court's authority to regulate the conduct of class actions is Rule 23(d), Fed. R. Civ. Pro., which provides that courts may make "appropriate order[s]" dealing with procedural matters in Rule 23 actions. Orders and local rules inconsistent with Rule 23 are unauthorized. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974) (preliminary inquiry as to merits); Coles v. Marsh, supra, 560 F.2d at 189 (communications order); Rodgers v. United States Steel Corp., supra, 508 F.2d at 163-164 (communications rule). 69/

68/ Constitutional adjudication may be unnecessary if non-constitutional grounds are dispositive. See, Hagans v. Lavine, 415 U.S. 528, 549 (1974); Rodgers v. United States Steel Corp., 508 F.2d 152, 163-164 (3d Cir.), cert. denied, 423 U.S. 832 (1975).

69/ See also, Sanders v. Russell, 401 F.2d 241, 245-248 (5th Cir. 1968); McCargo v. Hedrick,

A. The Orders Are Inconsistent with Rule 23.

Rule 23(d) "is concerned with the fair and efficient conduct of the action." Advisory Committee Notes, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 106 (1966). The general purpose of the class action procedure is to "achieve economies of time, effort and expense, and [to] promote uniformity of decisions as to persons similarly situated." Id. at 102, 103 (Rule 23(b)(3)). Often "[e]conomic reality dictates that [a] suit proceed as a class action or not at all," Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 161.

69/ continued

545 F.2d 393, 401-402 (4th Cir. 1976). Local rules are authorized by Rule 83, Fed. R. Civ. Pro. (a district court "may from time to time make and amend rules governing its practice not inconsistent with these rules"), and 28 U.S.C. §2071 (district court "rules shall be consistent ... with rules of practice and procedure prescribed by the Supreme Court"). Thus, local rules must conform to Rule 23. Rodgers v. United States States Steel Corp., supra, 508 F.2d at 163-164.

> "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 339 (1980). Thus, "the First Amendment principle that groups can unite to assert their rights as effectively and economically as practicable," United Transportation Union v. State Bar of Michigan, supra, 401 U.S. at 580, is consistent with the purposes of class action litigation.[70/]

Moreover, injunctive and declaratory relief

70/ Petitioners mistakenly assert that the Court has construed Rule 23 to grant the courts "broad authority" to enter appropriate orders because "class actions are a special kind of litigation." Br, p. 14. Instead, the Court has found that judicial authority to regulate class actions is bounded by the language and history of Rule 23. Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 177 (notice requirements and preliminary determi-

actions under Rule 23(b)(2) were specifically intended to include "various actions in the civil rights field where a party is charged with dis-

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70/ continued

nation of merits); see, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356 et seq. (1978). In Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978), where the issue was the "death knell" doctrine of interlocutory appeal, the Court specifically declined to be drawn into the debate over whether the class action is "a vexatious kind of litigation" or "serves a vital public interest," because "policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide."

> "There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation."

Id. In Deposit Guaranty National Bank v. Roper, supra, 445 U.S. at 339, where the issue was appealability and mootness, the Court again specifically declined an invitation to stem the "potential for misuse of the class action mechanism."

criminating against a class," Advisory Committee, Note, supra, 39 F.R.D. at 103, such as the instant action. "Suits alleging racial or ethnic

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70/ continued

> "That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences."

The "potential for misuse" referred to in Roper is plaintiffs' counsel's incentive to increase the size of the class for fee-spreading purposes, a consideration absent here because any fees would be awarded by the court and would not ordinarily depend on the size of the class. Petitioners' reliance on Livesay and Roper is therefore erroneous.

Petitioners' suggestion that "the 'potential for misuse' has often matured into actual abuse of the class action device resulting in harmful effects on the rights of potential class members," Br, p. 15, is indistinguishable from similar claims made in Livesay and Roper, and is "irrelevant," Livesay, supra, 437 U.S. at 470, as a

discrimination are often by their very nature class suits, involving classwide wrongs." East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395, 405 (1977); Potts v. Flax, 313 F.2d 284, 289 (5th Cir. 1963) (cited by the Advisory Committee). Class action treatment and relief are particularly appropriate in the enforcement of Title VII, which "vest[s] federal courts with plenary powers to enforce the statutory requirements," Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), in order "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971). "'The provisions of this subsection are intended to give the courts wide discretion

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70/ continued

matter of law. See, supra pp. 45-48. Of course, on this record showing complete absence of "abuse," the suggestion is also "irrelevant" as a matter of fact, as the Fifth Circuit found. See, supra at 17, 22, 24. As the Court put it in Oppenheimer Fund, Inc. v. Sanders, supra, 437 U.S. at 363, in the context of class member identification expenses, "[a] bare allegation of wrongdoing ... is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff's case."

exercising their equitable powers to fashion the most complete relief possible.' ... 118 Cong. Rec. 7168 (1972)." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1971).[71/] Plaintiffs in Title VII litigation are "private attorneys general vindicating a policy that Congress considered of the highest priority." Franks v. Bowman Transportation Co., 424 U.S 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

"There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education[al] Fund, Inc., to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination." Rodgers v. United States Steel Corp., supra, 508 F.2d at 163. Restrictions on communications such as those imposed in the instant case are also inconsistent with the policy underlying Rule

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71/ "The 1972 amendments retained the private right of action as 'an essential means of obtaining judicial enforcement of Title VII,' Alexander v. Gardner-Denver Co., supra at 45, while also giving the EEOC broad enforcement powers."

General Telephone Co. v. EEOC, 446 U.S. 318, 332-333 (1980).

23 "in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit," id., and they impair plaintiffs' activities which are "directed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of ... discrimination claim[s]." Coles v. Marsh, supra, 560 F.2d at 189. This led the Third Circuit to hold in Rodgers, with respect to a local rule modeled on the Manual, that the district courts were not empowered "to require prior judicial approval of communications between plaintiffs, or their attorneys, and third parties, when such communications seek to encourage common participation in a lawsuit," 508 F.2d at 164. Coles held, with respect to an order substantially similar to the one here, that the district court "lacked power to impose any restraint on communication for the purpose of preventing the recruitment of parties plaintiff or ... the solicitation of financial or other support to maintain the action." 560 F.2d at 189. Similarly, the Fifth Circuit en banc ruled in the instant case that "[b]ecause we hold that the order violates the First Amendment, it

follows that it cannot be an 'appropriate order' under Rule 23(d) of the Federal Rules of Civil Procedure." (JA 268; see, also, JA 269-275 (Tjoflat, J., specially concurring); JA 276 (Fay, J., issuing a special concurring statement)).

B. Rule 23 Should Be Construed So As To Avoid Grave Doubts of Unconstitutionality.

Courts have "favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality," and it must be assumed that Congress is "sensitive to and respectful of the liberties of citizens." Ex parte Endo, 323 U.S. 283, 299-300 (1944); Kent v. Dulles, 357 U.S. 116, 130 (1958). The Court does "not assume that Congress chose to disregard a constitutional danger zone," Yates v. United States, 354 U.S. 298, 319 (1957), and has therefore construed provisions "in the direction of constitutional policy." Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974). It has, therefore, long been the rule, as Justice Holmes put it, that "[a] statute must be construed, if fairly possibly, so as to avoid not only the conclusion that it is unconstituitonal, but also grave doubts

upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); United States v. Standard Brewery, 251 U.S. 210, 220 (1920); ICC v. Oregon-Washington R. & Nav. Co., 288 US. 14, 40 (1933). Thus, Rule 23 should be construed as not authorizing the imposition of prior restraint on communications by plaintiffs or their counsel with actual or potential class members in class actions.

CONCLUSION

The opinion and order of the Fifth Circuit en banc should be affirmed.

Respectfully submitted,

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Addendum A

May 1, 1976

Dear Mr. Hayes:

In line with its continuing policy of providing equal opportunity to all employees and annuitants, Gulf has recently entered into an agreement with the United States Equal Employment Opportunity Commission and the U. S. Department of the Interior. As part of the written agreement, Gulf has identified certain employees and annuitants to whom back pay will be offered in settlement of past discrimination claims, even though Gulf does not admit to having discriminated against anyone. You are a member of this group of employees and annuitants, and should you accept the terms of this offer, you will immediately receive by certified mail $1,163.34 less legal deductions for social security, if applicable, and income tax. The amount of your back pay was figured according to your plant seniority date, and very probably will not be the same as that of anyone else presented an offer under the agreement.

Because this offer is personal in nature, Gulf asks that you not discuss it with others. Gulf will likewise respect your complete privacy by not disclosing the amount offered you to other employees or annuitants. Even though both you and Gulf may feel that you have not been discriminated against in any way by Gulf, the money is available to you upon acceptance. To help you make a decision, Gulf wants you to understand that the only condition for accepting back pay is that you sign a written statement releasing Gulf from any possible claims of employment discrimination occurring before the date of your release, including any future effects of alleged past practices. Of course, in all other ways you will retain full rights to administrative and legal processes.

Enclosed you will find a written "Receipt and General Release". You may immediately receive your back pay check by completing all questions on the Receipt and General Release, signing before a Notary Public and returning it in the self-addressed envelope provided. Services of a Notary Public will be provided at no charge by calling 983-3301, ext. 484 or 467. Once you have returned the signed Receipt and General Release, you should receive your check by mail within 7 to 10 days.

If you feel that you cannot respond because you do not understan Gulf's offer, you may contact Mr. C. B. Draper at 983-3301, ext. 467, during normal business hours, to arrange an interview with a governme representative who will answer your questions.

Equal Employment Opportunity Commission

By: James R. Anderson
James R. Anderson

Gulf Oil Co. - U. S.

By: B. F. Short
B. F. Short

Enclosure

ATTENTION BLACK WORKERS OF GULF OIL

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN. These lawyers will talk to you FOR FREE:

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled Bernard v. Gulf Oil Co., which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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Manual for Complex Litigation, 1 (Pt. 2) J. Moore Federal Practice Pt. II, § 1.41 (2d ed. 1980) 3, 5, 6, 9, 12, 13

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PETITIONERS' REPLY BRIEF

This reply brief is submitted by Petitioners in response to the briefs filed by the Respondents and by the *amici* who also urge affirmance of the judgment of the Court of Appeals.

ARGUMENT

I. Introduction

Respondents' brief contains two dominant themes: (1) the presumed merit of the underlying cause of action; and (2) the danger which this case presumably presents to the continued vitality of the first amendment speech and associational concerns set out in *NAACP v. Button,* 371 U.S. 415 (1963) and *In Re Primus,* 436 U.S. 412 (1978). The first of these themes is, of course, irrelevant to a proper disposition of this Court's limited grant of certiorari.[1] It is also quite unfair to the Petitioners who, at this point, have not yet had the opportunity to present fully their position at the trial level.[2] Like many Title VII actions, the substantive issues in this case are not easy. Indeed, they occupied Gulf and the cognizant federal agencies for over seven years before the filing of this action. At this stage Respondents' lengthy, *ex parte* presentation of the matter is premature and, indeed, renders more difficult the task of focusing on the important issue upon which this Court has granted certiorari.[3]

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1. Respondents, by way of anticipating their argument, dispute the formulation of the question presented by the Petitioners and upon which this Court granted certiorari. *But see* Supreme Court Rule 21.1(a).

2. As Respondents note in their brief, (R. Br. 70) due process of law involves not only the right to proper notice but also the right to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). *See also Fuentes v. Shevin,* 407 U.S. 67, 80 (1972), quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Petitioners have not yet had that opportunity to be heard.

3. Respondents' continued unsupported assertions of liability in this case (before any discovery has taken place) (R. Br. 7, 8, 94-96) support Petitioners' position that monitoring orders are necessary. It can only be assumed that Respondents' speech before

Respondents' second major theme, a perceived threat to the continued vitality of *Button* and *In Re Primus* is, we submit, simply not responsive to the question before the Court. In the following paragraphs, we shall set forth, albeit briefly, our reasons for submitting that these two cases ought not control the Court's disposition of this case.

II. The Special Responsibility of the Litigator

The fundamental flaw in the Respondents' characterization of this case is their failure to recognize fully and to deal frankly with the particular demands of class action litigation. Certainly all lawyers are, in all aspects of their professional work, "officers of the courts." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). However, when they appear as counsel in a particular case, they have a special "fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring). This special duty to the court during ongoing litigation falls on all attorneys engaged in litigation irrespective of their clients, their fee arrangements or the nature of the arguments which they are tendering to the court.[4]

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the assembled potential class members was equally zealous and optimistic about their chances of success on the merits and their ability to recover substantial damages against Petitioners. The district court's entry of the order was justified since, as one court found in applying the *Manual's* requirements: "Plaintiffs' counsel's enthusiasm has led them to make optimistic statements about yet unresolved legal and factual issues in this case which I believe are not justified and much of the material filed in the court has been studded with overheated rhetoric." *Payton v. Abbott Labs.*, 86 F.R.D. 351, 352 (D. Mass. 1980).

4. While this Court recognized in *NAACP v. Button*, 371 U.S. 415 (1963) that the NAACP Legal Defense Fund has "a corporate

Consequently, it simply is not correct to assert, as Respondents do (R. Br. 43), that the relationship between the attorneys of record in this litigation and the potential class members was the same as the relationship between the attorneys and possible plaintiffs in *Button* and *Primus*. As we noted in our opening brief (P. Br. 16), the district court and those appearing before it, have a special obligation to assure that members of the potential class receive complete and accurate information so that they may exercise their rights in an informed manner and in a manner compatible with the purpose of class actions.

III. The Order Under Review

With respect to the order under review,[5] Respondents' reliance (R. Br. 33) on the general proposition that

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reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation" *id.* at 422, it has never intimated that different rules of litigation conduct ought to apply to this organization or any other group. Respondents forcefully argue that the role of the Legal Defense Fund in this litigation is distinguishable from that of counsel who use the legal process for "purely private gain," (R. Br. 37), but, in fact, of the attorneys who appeared and addressed the assembled potential class members only one, Ulysses Gene Thibodeaux, was, at that time, a staff attorney with the Legal Defense Fund. The other two attorneys, Ms. Stella M. Morrison and Mr. Charles E. Cotton were private practitioners who would benefit personally and financially from any award of attorneys fees. (See Ms. Morrison's affidavit where she states an award of attorneys fees would be accepted by her; but she does not indicate whether the fee would be turned over to the Legal Defense Fund. J.A. 118-20). Ms. Morrison also stated in her affidavit she has retainer agreements with 34 members of the potential class; but she failed to state how each of these arrangements was solicited. (J.A. 118-20). Mr. Cotton, who also attended the meeting, neither submitted an affidavit nor explained his economic relationship with the plaintiffs.

5. Respondents' claim that the validity of three separate orders is before the Court. The temporary order issued by Judge Steger on May 28, 1976, expired by virtue of its own terms upon Judge

"broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms," *United Mineworkers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967), does little to resolve the concrete problem before this Court. The district court here was hardly dealing with a "very distant possibility of harm." *United Mineworkers, supra* at 223. Rather, the trial judge was dealing with a type of proceeding and a stage in the litigation process known to cause serious problems of fairness. He could draw not only upon the collective wisdom and experience of his fellow judges who, in drafting the *Manual for Complex Litigation*,[6] reprinted in 1 (Pt. 2) J. MOORE FEDERAL PRACTICE Pt. II, § 1.41 (2d ed. 1980) (hereinafter cited as *Manual*) had noted the particular danger of confusion and unfairness at

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Fisher's entertainment of Petitioner's motion to modify, filed on June 8, 1976. (J.A. 45). Significantly, during the pendency of that interim order, Respondents did not seek modification of the order and they did not demonstrate that during that short period, they were harmed in any way.

Respondents' motion for permission to communicate with members of the proposed class, filed July 6, 1976, was made pursuant to the terms of Judge Fisher's order of June 22, 1976 (J.A. 130), and is therefore, merely an application of that order. As Petitioners note, p. 11, *infra*, this motion of Respondents is a good example of the sort of abuse which the *Manual for Complex Litigation* model order was intended to prevent.

6. "The *Manual* is designed to provide for the fair, firm, and efficient judicial control of complex litigation. (Citation omitted). A district judge is not left in the position of a captain whose ship, lacking a rudder and throttle, proceeds at its own speed in its own direction. Instead, the *Manual* encourages and provides suggestions as to how the district judge should exercise control over the parties and give the case direction." *In Re Financial Securities Litigation*, 609 F.2d 411, 428 (9th Cir. 1979), *cert. denied sub nom., Gant v. Union Bank*, 446 U.S. 929 (1980).

at this stage of class action proceedings,[7] but also upon the situation before him.[8]

Respondents and *amici* state the district court must make specific and formal findings before entering the monitoring order pursuant to Rule 23, Fed. R. Civ. P. (See R. Br. i Questions Presented, 22, 46-47 and Gov. Br. 16). But the Federal Rules of Civil Procedure do not, of course, require that such specific findings be made. *See* Fed. R. Civ. P. 52(a).[9] Moreover, in *Arizona v. Wash-*

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7. The Government's amicus brief notes that "[t]his section of the *Manual* [1.41] is presently undergoing revision" (Gov. Br. 6 n.5). The implication is that the provision in question will no longer be kept in its present form. However, it should be noted that the *entire Manual* is being reexamined. At least the most recent draft of the proposed revised *Manual* retained the provision in question. Certainly, it is even more relevant that, in the *Manual's* most recent official update, the Board of Editors, despite the criticism of this section, retained the section noting "[f]urther, experience continues to teach that it is dangerous to await the occurrence of an abuse before trying to correct it." *Manual* (2d ed. Supp. 1980-81)

8. The situation, as the record shows, was that Respondents' attorneys appeared before about 75 potential class members four days after commencing this action and discussed the issues, the type of relief requested and explained various problems. (J.A. 116, 118). The attorneys, as reported to Gulf, also advised the gathering not to sign the conciliation releases and to return the conciliation checks since by prosecuting this action Respondents' attorneys could recover at least double the amount paid under the conciliation agreement. (J.A. 22-24). Therefore, even if this Court would hold that a district judge may not enter an order of this type on the basis of the acknowledged difficulties which other judges have encountered in this area, it must still confront the fact that this case involves a significantly greater demonstration of actual danger to the possible class members. Thus, this case does not raise the question of whether a district court may enter the model order absent a demonstration of abuse to the rights of potential class members.

9. Even where findings of fact and conclusions of law are required under Rule 52(a), the cases state that their entry is not necessary where the record supports the judgment. *Mallory v. Citizens Utilities Co.*, 342 F.2d 796, 792 (2d Cir. 1965); *Huard-*

ington, 434 U.S. 497, 516-517 (1978), this Court noted that, with respect to the fifth amendment right of double jeopardy:

> Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.
>
> Review of any trial court decision is, of course, facilitated by findings and by an explanation of the reasons supporting the decision. No matter how desirable such procedural assistance may be, it is not constitutionally mandated in a case such as this. (Cites omitted). The basis for the trial judge's mistrial order is adequately disclosed by the record, which includes the extensive argument of counsel prior to the judge's ruling.[10]

The fact that the district court did not set forth formally how he chose to reconcile the conflicting statements by the parties is irrelevant. What is relevant is that the conflicting statements of counsel with respect to how the potential class was being approached clearly manifested sufficient danger of abuse of the class action process to permit—indeed to require—the district court to act. It was the trial judge, not the appellate court, who had the opportunity to evaluate the degree to

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Steinheiser, Inc. v. Henry, 280 F.2d 79, 84 (6th Cir. 1960). Even in first amendment cases, orders limiting communications may be made with "substantial support in the record" *In Re Primus, supra* at 434, or on a "specific record" *Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977), *cert. denied*, 434 U.S. 985 (1977).

10. Federal courts have followed this rule in federal cases. *United States v. Grasso*, 600 F.2d 342, 343 (2d Cir. 1979) *rev'd on other grounds*, 629 F.2d 805 (2d Cir. 1980); *United States v. MacQueen*, 596 F.2d 76, 83 (2d Cir. 1979).

which the rights of the potential class members would be placed in jeopardy by the continued unsupervised communications of the parties and their counsel. In *Arizona v. Washington,* 434 U.S. 497 (1978), the Court found that "the overriding interest in the evenhanded administration of justice" required "the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment." *Id.* at 511. So too, here, the appellate court and this Court owe "the highest degree of respect to the trial judge's evaluation," *ibid,* that the situation before him could seriously mislead members of the class who were his ultimate responsibility. "He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the *tone* of argument as it was delivered. . . . In short, he is far more 'conversant with the factors relevant to the determination than any reviewing court can possibly be.' *See Wade v. Hunter,* 336 U.S. 684, 687 (1949)." *Id.* at 514. While, as Respondents point out (R. Br. 46), appellate counsel cannot support restrictions on fundamental rights by conjecture, neither ought they, nor appellate courts, attempt to second-guess the trial judge whose familiarity with the case and with the parties and their counsel led him to conclude that he could not adquately protect the potential class members if he were to assume a more passive role.

Consequently, while it is indeed true that restrictions on first amendment rights should be "closely drawn to avoid unnecessary abridgement of associated freedoms," *Buckley v. Valeo,* 429 U.S. 1, 25 (1976), a restriction, when necessary, cannot be so narrowly drawn as to render it impotent. Here, the order describes the forbidden con-

duct as precisely as the litigation situation permits. By its very terms, it exempts all communications where the speaker asserts "a constitutional right to communicate with any member of the class without prior restraint." (J.A. 125).[11] Moreover, it is well undestood that monitoring orders entered pursuant to the *Manual for Complex Litigation* are subject to frequent modification since the trial judge has the continuing obligation to tailor the terms of the order to the unfolding litigation situation. Indeed the *Manual* itself states:

> Promptly after the entry of the recommended order, or the applicable date of the local rule in a case, and at all times thereafter, the court should, upon request, schedule a hearing at which time application for relaxation of the order and proposed communications with class members may be presented to the court. Because the recommended rule and order are designed to prevent only potential abuse of the class action and are not meant to thwart normal and ethically proper processing of a case, the court should freely permit proposed communications which will not constitute abuse of the class action. In many cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.

Manual, § 1.41.

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11. Respondents' characterization of the order as a "gag order" (R. Br. 27), "barring communications" (R. Br. 30) and blanket prohibitions (R. Br. 73) is incorrect. The order allowed Respondents' attorneys to communicate with: (1) their clients and potential clients who sought their advice (J.A. 125); (2) the 34 retained clients of Ms. Morrison (J.A. 125); (3) the over 450 individuals (J.A. 23) who had signed releases prior to suit (J.A. 124); (4) all potential class members where a prior restraint was asserted (J.A. 125); and (5) all individuals where prior court approval has been given. (J.A. 124).

Consequently, the parade of horribles which Respondents contend will necessarily follow from this order (R. Br. 88 *et seq.*) are purely conjectural.[12] In the course of the litigation, the trial court would be expected to modify his order in order to permit both parties to prepare adequately for trial and protect their attorneys' work product.

Moreover, contrary to the suggestion of Respondents, the order of the district court was not "directed at particular groups or viewpoints," *Broadrick v. Oklahoma,* 413 U.S. 601, 616 (1973), but sought to regulate, "in an even-handed and neutral manner" *ibid.,* the conduct of *all* those presently engaged in litigation before the court.[13] Thus, presented with assurances by government officials[14]

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12. Respondents contend that their discovery rights, both individual and class, were impaired by the order (R. Br. 2, 42, 89-91), but Respondents neither attempted any discovery nor demonstrated that the order in any way prevented them from pursuing discovery through normal channels such as depositions or interrogatories.

13. Respondents incorrectly contend company officials were free to discuss the case with their black employees (R. Br. 81, 89) and could have intimidated witnesses and potential class members. (R. Br. 90). The record reflects quite the contrary. Gulf voluntarily suspended all conciliation discussions with potential class members as soon as suit was filed (J.A. 43), sought a monitoring order to be applied to both sides of the litigation (J.A. 21, 46, 92, 124) and then abided by the terms of that order by allowing the clerk of court to disseminate all further notice to potential class members (J.A. 128). There is neither record support nor allegations that Gulf improperly contacted potential class members either before or after entry of the monitoring orders.

14. The Government apparently has abandoned the sworn statements of the District Director of the EEOC (J.A. 71) and the Regional Manager of the OFCCP (J.A. 76) that the conciliation agreement was a "fair and reasonable" settlement of all charges of discrimination and upon its fulfillment would put Gulf's Port Arthur Refinery in compliance with Title VII and Executive Order 11246. (See Gov. Br. 1, 2, 4, 6, 20 n.15). The Government now contends the May 1, 1976, letter (See Gov. Br. App. 1a—a letter not in the record of this case) did not properly inform covered employees of

(J.A. 71-76) that the conciliation agreement was the product of an "extremely thorough and comprehensive" investigation (J.A. 73), was based on an examination of "all relevant documents and business records of Gulf" (J.A. 73) as well as "on-site investigations" (J.A. 73) and "numerous meetings with Gulf's executives" (J.A. 73) and thus "a fair and reasonable settlement" (J.A. 78), the district court modified its order to permit members of the potential class to be presented with the conciliation agreement. At the same time, however, he required that such contact be undertaken under the supervision of the court and that members of the potential class be informed, simultaneously, of the pendency of the present action. (J.A. 128-129).

This evenhanded approach is not impeached by the district court's subsequent denial of Respondents' motion to modify further its order and to permit the Respondents to distribute a flyer. (R. Br. Appx. B). Not only was this

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the terms of that settlement (Gov. Br. 4, 20). The Government incorrectly says the letter was sent to potential class members (Gov. Br. 20). This was impossible since at the time the letter was sent, no suit had been filed and it went only to those people who received conciliation benefits—a much smaller group than Respondents' later alleged class. Ironically, the letter now so heavily criticized by the United States and the EEOC in their brief was required by the conciliation agreement (J.A. 31), approved by the EEOC (J.A. 31), and signed by the EEOC (J.A. 31, Gov. Br. App. 2a). Contrary to the Government's and Respondents' contention that the letter was not informative (Gov. Br. 20, Br. 4, 20), it explained the backpay award was based on seniority (Gov. Br. App. 1a) and it stated that questions about the conciliation agreement would be answered not by Gulf, but by the EEOC. (Gov. Br. App. 2a).

In light of the Government's virtual abandonment of the position it took in the trial court, employers would be better served by always litigating Title VII issues rather than engaging in conciliation since the Government has, by its present stand, seriously undermined the conciliation proccess.

material in a sense duplicative with the earlier communication of the district court (J.A. 128-129), it was also a good example of the sort of material which justifies a monitoring order such as the one entered in this case. As noted by Gulf in its motion in opposition, (J.A. 139-145), the language in the proposed leaflet contained several serious ambiguities which could have precipitated extraordinary confusion among members of the potential class (J.A. 140-143), and it did not comply with the terms of the order for submitting statements to the district court (J.A. 124). The plaintiffs' proposed notice is also a rather graphic example of why the district court could not have been expected to employ a "less drastic" alternative, *see generally Shelton v. Tucker,* 364 U.S. 479, 488 (1960), to serve their concerns about the fair and orderly administration of justice. It is indeed difficult to perceive how erroneous information disseminated to such a large and geographically dispersed group as "the black workers of Gulf" could have been corrected without imposing incalculable hardships, both financial and human, on a significant number of the members of the potential class. Moreover, in a very real sense, the monitoring order entered in this case, as suggested by the *Manual for Complex Litigation,* is itself a less restrictive alternative since it exempts from its scope all privileged speech and is entered on the understanding that it will be continually modified as the litigation progresses to meet the needs of the parties.[15]

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15. Rather than supporting the use of a monitoring order to control misrepresentations, both the Government (Gov. Br. 31) and Respondents (R. Br. 29) suggest that misrepresentations can be controlled by disciplinary action against the lawyers and remedial notice to the affected potential class members. This suggestion ignores the purpose of the order which is to prevent misrepresentations rather

Finally, by failing to suggest any test to this Court under which a monitoring order could be entered, both the Respondents and the Government seem to imply that the district court is without discretion, or has very limited discretion, when first amendment rights are collaterally affected, to enter the *Manual's* suggested order. If this is the case, then parties and their attorneys will be cast against each other in an atmosphere much like a political campaign to solicit the favor of potential class members while the district court is forced to stand helplessly by.

IV. Conclusion

The decision in this case will have profound impact on the ability of the courts to ensure that their proceedings are conducted in a fair and orderly manner. Petitioners urge the Court to ratify the important fiduciary duty owed to the judicial process by those who invoke its protection

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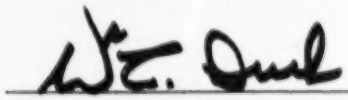
than attempting to remedy the harm done after the misrepresentations have been made. Furthermore, the monitoring order serves to detect misrepresentations at the earliest possible time so that the district court will know when remedial action is necessary. Without the monitoring order, the district court may not discover the harmful conduct until it is too late to employ remedial action.

and to recognize the special fiduciary obligation of litigating counsel to the court before which they stand.

Respectfully submitted,



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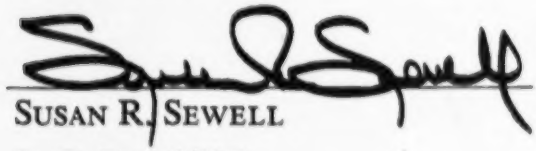

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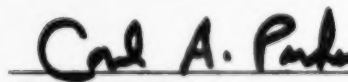

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I hereby certify that on the 23rd day of March, 1981, a true and correct copy of the foregoing Petitioners' Reply Brief was deposited in the United States Post Office with first class postage prepaid and properly addressed to the following parties to this action and others required to be served:

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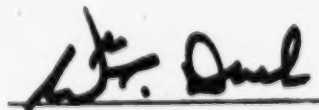

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No. 80-441

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THE UNITED STATES

October Term, 1980

Gulf Oil Company, et al., Petitioners,

v.

Wesley P. Bernard, et al., Respondents.

On Writ of Certiorari to the
United States Court of
Appeals for the
Fifth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA AND THE GEORGE WASHINGTON LAW REVIEW, *AMICI CURIAE*

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Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar, 337 U.S. 1 (1964) 22

Buckley v. Valeo, 424 U.S. 1 (1975) 24 n.3

Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968) . . . 39

CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) 43 n.6

Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub. nom. Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976) 43 n.6

Coles v. Marsh, 506 F.2d 186 (3d Cir. 1977), *cert. denied sub. nom. Blue Cross of Western Pennsylvania v. Marsh*, 439 U.S. 916 (1978) . . 24 n.3,42

Craig v. Harney, 331 U.S. 373 (1947) 42

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 35

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Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) 3,14

De Mier v. Arlington County, No. 80-1086-A (Ed. Va. filed Nov. 12, 1980). 16

Emspak v. United States, 349 U.S. 190 (1955) 35

Gomez v. Wilson, 477 F.2d 411 (D.C. Cir. 1973) 3

In re Halkin, 598 F.2d 176 (D.C. Cir. 1979) 36

Hirschkop v. Snead, 594 F.2d 356, (4th Cir. 1972)(en banc) . .37,44 n.6,45

Johnson v. Zerbst, 304 U.S. 458 (1938) 35

Kleindienst v. Mandel, 408 U.S. 753 (1972) 25

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). . . 42

Logan v. Shealy, No. 80-210-A (E.D. Va., Sept. 30, 1980) *appeal filed* No. 80-1815 (4th Cir., Nov. 21, 1980 . . . . . .16 n.1

Louisiana v. NAACP, 366 U.S. 293 (1961) 33

Luevano v. Campbell, No. 79-0271 (D.D.C., motion for preliminary approval of consent decree filed Jan. 9, 1981) 20

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NAACP v. Button, 371 U.S. 415 (1967). 19,20,38,39,48

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Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 2,17,39

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 16

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Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980) 2,25

Rodgers v. United States Steel Corp. (Rodgers I) 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975) 33,45

Rodgers v. United States Steel Corp. (Rodgers II), 536 F.2d 1001 (3d Cir. 1976). 28,35,43 n.6

Shelton v. Tucker, 364 U.S. 479 (1960) 33,34,38,39

Sherbert v. Verner, 374 U.S. 398 (1963) 34

Southeastern Promotions, Ltd. v. Conrad, 400 U.S. 546 (1975) . . . 48

TABLE OF AUTHORITIES continued

Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973). 3,14

United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) 23,38

United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) . . 36

United States v. Marcano Garcia, 456 F. Supp. 1354 (D.P.R. 1978) . 43 n.6

United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) 43,44 n.6

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 30

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Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1978) 23,25,26,28

Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972) 47 n.7

Weber v. Turner, No. 80-0412 (D.D.C., filed Feb. 12, 1980). 3

Wood v. Georgia, 370 U.S.375 (1962) 27,37,42

Zarate v. Younglove, 22 Fair Empl. Prac. Cas. 1025 (C.D. Cal. 25 n.3,26 (1980). 29,30,42,44 n.6,46,47

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Statutes and Rules:

Federal Rules of Civil Procedure
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Rules Enabling Act, 28 U.S.C. § 2072
(1976) 35 n.5

Other Authorities:

Administrative Office of United States Courts, *1980 Annual Report* . . . 21

Cappolleti, *Vindicating the Public Interest Through the Courts*, 25 Buffalo L. Rev. 643 (1976) . . . 22

Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) 22

Federal Judicial Center, *Manual for Complex Litigation* (1978 ed.)
. 11,20,30,41,43

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Settlements, *Rodgers v. United States Steel Corp.*, 4 Class Act. Rep. 509 (1975) 27 n.4

TABLE OF AUTHORITIES continued

Tribe, *American Constitutional Law* (1978) 47

Wilson, *Control of Class Action Abuses Through Regulation of Communications*, 4 Class Act. Rep. 632 (1975) . . 40

Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 Colum. L. Rev. 866 (1977) 22,23

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA AND THE GEORGE WASHINGTON LAW REVIEW, *AMICI CURIAE*

INTEREST OF AMICI*/

The American Civil Liberties Union Fund of the National Capital Area is the Washington, D.C. area litigation branch of the American Civil Liberties Union (ACLU), a nationwide organization of over two hundred thousand members which for sixty years has been dedicated to defending the principles

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*/ Counsel for all parties have consented to the filing of this brief. Copies of their letters to that effect are being filed with the Clerk.

embodied in the Bill of Rights, preeminent among them the First Amendment.

The ACLU has been involved, as counsel or as *amicus curiae*, in numerous First Amendment cases in this Court, including several that addressed the power of the courts to regulate speech in connection with judicial proceedings, *e.g.*, *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

The ACLU's interest in protecting the ability of counsel to communicate with members or prospective members of a class is quite direct, since much ACLU litigation is class action litigation. This Court recently stuck down a South Carolina disciplinary action against an ACLU cooperating attorney who was assembling plaintiffs for a class action. *See In re Primus*, 436 U.S. 412, 418 n.8 (1978). Many of the significant civil liberties cases brought by

the ACLU in the Washington, D.C. area have been class actions in which ACLU's ability to communicate with class members has been important to the conduct of the litigation. *E.g., Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977)(both challenging legality of mass "sweep arrests" in 1971); *Gomez v. Wilson*, 477 F.2d 411 (D.C. Cir. 1973)(challenging legality of police "investigatory stop" procedures); *Weber v. Turner*, No. 80-0412 (D.D.C. filed February 12, 1980)(challenging sex discriminatory employment practices at the Central Intelligence Agency).

The George Washington Law Review is a non-profit legal journal published by the students of the National Law Center of the George Washington University. The *Review* has on many occasions sought to inform and persuade the courts and the legal community on First Amendment issues. Recently, the

staff has written Notes on cases raising questions similar to those raised here. *See, e.g.*, Note, *If the Issuance of a Protective Order Pursuant to Federal Rule 26(c) Would Restrain Expression, the District Court Must Determine the Order's Constitutionality -- In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), 48 Geo. Wash. L. Rev. 486 (1980).

This Court granted certiorari in the instant case during the *Review's* preparation of a Note on the en banc decision below. The *Review* believed that the results of its research on the constitutional issues presented might be helpful to this Court's consideration of the case.

Amici believe that the order issued in this case was an unconstitutional prior restraint for the reasons given by the Fifth Circuit. We show in this brief that there are important additional reasons why such an order should not be countenanced under the First Amendment.

SUMMARY OF ARGUMENT

I. COURT RULES OR ORDERS RESTRICTING COMMUNICATIONS WITH CLASS MEMBERS WOULD SERIOUSLY INTERFERE WITH LITIGANTS' ABILITY TO PROTECT CONSTITUTIONAL RIGHTS THROUGH LITIGATION.

Communications with potential class members serve the important purpose of locating members of the class who may not be locatable at a later date, thereby obtaining their evidence and preserving their ability to obtain a remedy if the suit is successful.

A ban on communications with potential class members is necessarily a ban on publicity generally. Such a ban prevents the public dissemination of information about subjects of public importance, and thereby prevents the politically active from persuading others of the correctness of their position on important public issues. This is an intolerable infringement of a core interest protected by the First Amendment.

II. THE ORDER VIOLATES THE FIRST AMENDMENT.

A. The Order Restrains Constitutionally Protected Expression.

In this class action, the speech of the plaintiffs and their attorneys was clearly political in nature and therefore within the ambit of First Amendment protection. Expressional activity aimed at vindicating claims of racial discrimination has been explicitly held by the Supreme Court to be protected. Over half of all federal class actions are civil rights suits. Allowing wholesale restraint on communication merely because it occurs in the class action context is therefore inappropriate.

The rationale for protecting speech in class actions is, however, not limited to civil rights suits. Class actions provide a means for the broad implementation of constitutional and statutory policies. This Court's protection of litigation-related expression has not been limited to

political expression. Because rights of free speech are not confined to any particular field of human endeavor, the speech of class action litigants is protected even if economic rights are involved.

The district court's order infringed upon the class members' right to receive information and ideas. An effort to protect members of the class by quarantining them from information is inconsistent with the philosophy of the First Amendment -- that informed citizens will be best able to make decisions. Prospective class members can only protect their interests if they receive information about the choices available to them. Moreover, preventing interaction between class members and class representatives hinders proper development of class suits, and infringes on the basic right of collective activity undertaken to obtain meaningful access to the courts.

The order challenged in this action restrained communications necessary to catalyze associational ties among persons who may be suffering a common injury caused by unlawful racial discrimination.

B. Constitutionally Protected Expression Does Not Lose Its Protection Merely Because It Occurs in the Context of Litigation.

Courts are not exempt from constitutional strictures which the First Amendment places on governmental action. Neither do persons who seek to vindicate their rights through civil litigation, or their legal representatives, waive their First Amendment rights. Nor are attorneys, in their capacity as officers of the court, transmuted into government agents whose First Amendment rights may be validly circumscribed.

C. The Order Does Not Satisfy Traditional First Amendment Standards for Restrictions on Protected Expression.

Governmental restrictions which burden vital First Amendment freedoms are subject to the strictest scrutiny. Even if the governmental purpose is legitimate and substantial, as it is for protecting the administration of justice, the restriction must be extremely narrow, and can only be imposed if no less onerous alternatives are available. Moreover, to be permissible it must be shown that the restraint is directed at a substantive evil which will actually impede the fair administration of justice. Even then, however, the threat must be grave and urgent. A majority of courts have adopted a standard requiring that there be a serious and imminent threat to the administration of justice before litigants' and lawyers' expression can be restrained. This standard best comports with Supreme Court decisions regarding sanctions on litigation-related communication. The order in the instant case does not satisfy

these requirements. Not only is the order extremely broad, but it does not rely upon any serious or imminent threats to the administration of justice as a justification for its imposition.

Any attempt to save the order by exempting constitutionally protected expression merely trades overbreadth for vagueness. The Constitution by itself does not provide clear enough guidelines to enable a person to determine whether or not his speech is protected, where, as here, other provisions of the order forbid all speech under penalty of contempt.

ARGUMENT

I. COURT RULES OR ORDERS RESTRICTING COMMUNICATIONS WITH CLASS MEMBERS WOULD SERIOUSLY INTERFERE WITH LITIGANTS' ABILITY TO PROTECT CONSTITUTIONAL RIGHTS THROUGH LITIGATION.

One of the major ways in which the ACLU attempts to protect the constitutional rights of individuals is through litigation, and a substantial proportion of ACLU's

important cases are brought as class actions.

Court rules or orders, such as those suggested by the *Manual for Complex Litigation* (the *Manual*), Part II, § 1.41 (1978 ed.), which would restrict ACLU attorneys' or clients' ability to communicate with potential class members, would substantially interfere with ACLU's ability to prepare and develop effective class actions. Frequently, it is only after the filing of a class action lawsuit, with its attendant publicity, that new plaintiffs come forward to join the suit. Such new plaintiffs, and the facts of their individual claims, often help to establish the existence of a certifiable class and to flesh out the range of issues involved in the lawsuit. The order's ban on indirect communications would prohibit such publicity and thus prevent potential plaintiffs from learning of the suit and coming forward.

Moreover, it is often very much easier and less expensive to locate potential class members at the initial stage of the litigation, even before the class is certified or court-ordered notice is sent to potential class members -- an event that often occurs months and even years after the case is filed, despite the exhortation to prompt action of Rule 23(c)(1).

At the inception of the case, class members are more likely still to be living in the same area, working for the same employer, or participating in the same government program, as at the time of the injury complained of. They are more likely still to have records or access to witnesses that can establish their claim and the claims of other class members. They are more likely still to be in contact with other members of the putative class who can bring the case to their attention or to whose

attention they can bring the case. As time passes, class members move out of the area, lose their records, and lose contact with other individuals who might alert them to their membership in the class. Not only may the later inability to locate such persons be detrimental to plaintiffs' ability to litigate the class action, it will also result in the denial to such unlocated class members of any recovery to which they may be adjudged entitled.

ACLU's experience in one notable set of cases is exemplary. During the first week of May, 1971, approximately 13,000 people were arrested in Washington, D.C. during the "Mayday" demonstrations against the war in Vietnam. Most were arrested in mass "sweep arrests" which indiscriminately rounded up the innocent with the guilty. Adequate arrest records were not kept, and hundreds of innocent arrestees were held for several days under inhumane conditions

before even being arraigned. *See Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977). Shortly after these arrests, the ACLU brought a series of class actions on behalf the arrestees, seeking declaratory relief, expungement of arrest records, and damages for violation of their constitutional rights and for false arrest and imprisonment. *Id.* Through newspaper advertisements and widespread publicity, the ACLU was able to locate a large number of the arrestees. Even under these circumstances, many were never located. But ACLU's later attempts to locate class members -- after classes were certified and again after damages were awarded or settlements reached -- have been much less successful. If the ACLU had been restrained from communicating with class members, directly or indirectly through the news media, at the

inception of these cases, there can be no doubt that a great many illegally arrested individuals would never have received the relief to which they were entitled.

The "Mayday" cases illustrate the serious evil that will result from the use of court rules or orders of the type here at issue. The order forbids communication "directly or indirectly" with potential class members. (J.A. 124). Necessarily, then, it forbids the parties, as well as their attorneys, from having virtually any contact with the press about the case, since any reports of their statements would be likely to reach potential class members. A court rule or order such as that issued here, by effectively barring communications with the press, would seriously interfere with the ACLU's ability to achieve its public interest goals through the executive or legislative action that such publicity can spur. For example, in a recent controversy

over the strip-search policy of the Alexandria, Virginia sheriff's office, the public outcry that resulted from the publicity accompanying the filing of lawsuits, including an ACLU class action (*De Mier v. Arlington County*, No. 80-1086-A (E.D. Va., filed November 12, 1980)), resulted in the sheriff's abandoning his policy, at least for the nonce. *See* Washington Post, December 23, 1980, at A-1 col. 7.[1/] This is precisely the role for public opinion which the First Amendment was designed to protect. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

[1/] Because the district court dismissed the first strip search case to come before it, *see Logan v. Shealy*, No. 80-210-A (September 30, 1980), *appeal filed*, No. 80-1815 (4th Cir. November 21, 1980), certification of a class and Rule 23 notice in the ACLU class action may well have to await the outcome of the pending appeal. Thus, as noted above, potential class members who came forward as a result of the publicity might otherwise have become unlocatable by the time Rule 23 notices were sent out.

Having canvassed some of the practical harms that are likely to result from the issuance of judicial orders forbidding communication with potential class members, we turn to the legal analysis of such orders under the First Amendment.

II. THE ORDER VIOLATES THE FIRST AMENDMENT.

As the Fifth Circuit recognized below, the gag order entered by the district court is a prior restraint on communication. (J.A. 243, 266). For the reasons that court noted, the order cannot stand. *See Near v. Minnesota*, 283 U.S. 691 (1931); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). As we will now show, the order also violated First Amendment standards applicable outside the prior restraint area.

A. The Order Restrains Constitutionally Protected Expression.

This Court has never directly addressed the question of First Amendment limitations on judicial power to restrain litigants'

and lawyers' expressive activity in the context of ongoing civil litigation. This is an important question because of the pivotal place held in our democratic society by the cluster of fundamental freedoms that make up freedom of expression -- freedom of speech and press, of assembly and association, the right to hear as well as to speak.

Each of these facets of freedom of expression is implicated by the district court's order in this case. Freedom of speech is implicated because class action litigants and their attorneys are subjected to a far-reaching prohibition on communication with class members about the lawsuit. The right of class members to receive information is concomitantly restricted. Freedom of press, which is equally the right of the pamphleteer as of the large newspaper, *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972), is implicated because the plaintiffs were prohibited from disseminating their pamphlet

to potential class members (J.A. 130-33, 157). Freedom of association and assembly are implicated because persons who had allegedly suffered similar injuries were prevented from joining together for the purpose of communicating and optimally effectuating redress.

1. The Order Restrains Political Speech.

In this class action, the speech of the plaintiffs and their attorneys was clearly political in nature and therefore protected. Its purpose was to redress perceived racial discrimination in employment. This Court has explicitly held that activity aimed at vindicating claims of racial discrimination through litigation is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-31 (1967). *Button* specifically protected such activities by the NAACP Legal Defense Fund, the same entity restrained by the district court's order here.

Id. at 421-22, 428. *In re Primus, supra,* subsequently reaffirmed the constitutional protection afforded political speech on behalf of nonprofit groups which litigate civil rights and civil liberties claims. The Constitution protects advocacy of lawful ends through constitutionally protected means, including litigation. *NAACP v. Button, supra,* at 429. The implementation of our strong national policies regarding eradication of discrimination, as evidenced by equal employment legislation, is a lawful end. Civil rights suits aimed at ending discrimination commonly use the class action format. *See, e.g., Luevano v. Campbell,* No. 79-0271 (D.D.C., motion for preliminary approval of consent decree filed January 9, 1971)(challenging use of PACE exam for federal hiring).

The *Manual for Complex Litigation, supra,* Part II, § 1.41 (J.A. 97-98), recommends the use of its local rule or pretrial order to

restrain communications in all class actions. Over half of all class actions pending in federal district courts are civil rights suits. Moreover, almost fifteen percent of civil rights suits are class actions. *See* Administrative Office of the United States Courts, *1980 Annual Report* A-22 to -23, -166 to -167. Since class actions are usually brought to adjudicate large numbers of claims, it can fairly be assumed that more persons' civil rights are adjudicated via class actions than otherwise. By authorizing wholesale restraint on communication merely because it occurs in the context of class actions, the *Manual* invites massive restraint on political speech, and hinders one of the most efficient mechanisms for the vindication of civil rights.

The rationale for protecting speech in class actions is not limited to civil rights class actions. The class action is a vehicle for the broad implementation of

constitutional and statutory policies, *see, e.g.*, Cappolleti, *Vindicating the Public Interest Through the Courts*, 25 Buffalo L. Rev. 643, 644 (1976), often through "lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964). In such litigation, "the subject matter of the lawsuit is not a dispute about private rights, but a grievance about the operation of public policy." Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976). The economies of scale and the equalization of the parties engendered by class actions make it feasible to redress injuries and protect interests which, if left to individual litigation, would not be vindicated because of fear, ignorance, or lack of resources or because the individual right is too small or too diffuse. *See, e.g.*, Yeazell, *Group*

Litigation and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866, 867 (1977).

2. Even If the Speech Restrained Is Viewed as Commercial, It Is Still Protected.

This Court has made it clear that protection of litigation-related communication is not limited to purely political expression. *See United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 221, 223 (1967). Even speech which does no more than propose a commercial transaction does not lack all First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 762 (1978). Thus the speech of class action litigants and lawyers is protected even if economic rights are implicated.[2/]

[2/] Indeed, if the bare fact that a speaker stands to gain money from his expression removed it from the ambit of the First Amendment, newspapers would have no protection for news stories.

The district court's order specifically restrains solicitation of funds and of agreements to pay fees and expenses from class members who are not formal parties to the action. (J.A. 124). Yet this Court has held that speech is protected even though it may involve a solicitation to pay or contribute money. *Virginia Board of Pharmacy v. Virginia Citizens Council, Inc.*, *supra*, at 761 (citing cases); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 631-32 (1980). Class actions to vindicate important rights may be unable to go forward without the wherewithal to pay attorneys' fees and expenses. Contributions from the class whose rights are at issue and who may ultimately benefit from the litigation are a wholly legitimate means of effectuating their underlying rights.[3/]

[3/] *Cf. Buckley v. Valeo*, 424 U.S. 1, 19 (1975). Several courts have rejected the *Manual's* model in this regard, recognizing the inappropriateness of such restrictions. *See Coles v. Marsh*, 506 F.2d 186, 189 (3d Cir. 1977), *cert. denied sub nom. Blue Cross*

3. The Order Infringes Class Members' Right to Hear About Litigation Affecting Their Interests.

The First Amendment also embraces the right to receive information and ideas. *See, e.g., Virginia Pharmacy Board v. Virginia Consumer Council, supra,* at 756-57; *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972); *Richmond Newspapers v. Virginia, supra.* Our system of government, established by the Constitution, is predicated on the participation of informed citizens in decisions which affect their destiny. *See Bates v. Little Rock,* 361 U.S. 516, 522-23 (1960). Plaintiffs' attorneys in the case at bar sought to provide information about the lawsuit which potential class members had a

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3/ footnote continued

of Western Pennsylvania v. Marsh, 439 U.S. 916 (1978); *Zarate v. Younglove,* 22 Fair Empl. Prac. Cas. 1025, 1039 (C.D. Cal. 1980) (citing ABA Committee on Professional Ethics, Opinion No. 1280, which holds that it is permissible for a class action litigant to solicit funds to pay the attorney); *Norris v. Colonial Commercial Corp.,* 77 F.R.D. 672, 673 (S.D. Ohio 1977).

right to receive. The district court's order seriously infringed this right. *See Zarate v. Younglove*, *supra*, at 1027.

Petitioners claim that they are anxious to protect potential members of the opponent class, as they fear that class members will become confused, and chaos and disenchantment will result. Brief for Petitioners at 19-20, 23 & n.17, 29, 36-37. However,

> this protectiveness rests in large measure on the advantages of their being kept in ignorance. . . . There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia Pharmacy Board v. Virginia Consumer Council, *supra*, at 769-70. Normally, counterargument and education, rather than

censorship, are the antidotes for harmful speech. *See Wood v. Georgia*, 370 U.S. 375, 389 (1962). Court-ordered notice to the class regarding the lawsuit and any government-negotiated or other settlement is not guaranteed to be even remotely adequate to inform affected individuals about the nature of their choices. Indeed, the notice may not even be intelligible to them. *See* J.A. 128-29.[4/]

Class members' lack of sophistication may thus make it necessary and desirable for them to have personal encounters with legally trained personnel who can elucidate the notice. One court postponed a settlement until plaintiffs' attorneys had the opportunity to explain it to class members.

[4/] *See* Settlements, *Rodgers v. United States Steel Corp.*, 4 Class Act. Rep. 509, 509-13 (1975), for an expert linguistic analysis of one such notice, showing it to be substantially above the reading level of the class members and syntactically biased in favor of the settlement over the litigation.

Rodgers v. United States Steel Corp. (Rodgers II), 536 F.2d 1001, 1009 (3d Cir. 1976). In the instant case, however, Gulf's notice instructed employees not to discuss the settlement offer with others. Notice to Offerees, *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979)(Brief for the United States as Amicus Curiae, Exhibit 1). Plaintiffs in the case at bar were prevented from distributing a pamphlet simply advising offerees to consult an attorney before making a decision (J.A. 131-32, 157). It is not enough that the district court's order restraining communications exempted those initiated by the non-client class member. (J.A. 125). Freedom to speak and to hear may not be abridged merely because the listeners could come upon the message by some other means, such as "digging it up" for themselves. *Virginia Pharmacy Board v. Virginia Consumer Council*, *supra*, at 756-57 & n.15.

This Court has expressed its concern that aggrieved persons receive information regarding their legal rights and the means of effectuating them. *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977). This concern applies with at least as much force to individuals as to groups. *Id.* Individual class members will be bound by a class action judgment unless it is brought under Federal Rule of Civil Procedure 23(b)(3) and they exercise their prerogative to opt out. It is therefore desirable that these individuals become involved in the litigation at an early stage. *Zarate v. Younglove, supra,* at 1037. Actual or potential class members will thus be able to participate, voice their concerns, and provide information which will help to shape the issues. The class members and the attorney for the class will be able to provide the mutual guidance characteristic of the normal attorney-client relationship. As

one court has noted, plaintiffs' interest in obtaining information from class members to help prosecute the action far outweighs the government's interest in preventing plaintiffs' counsel from seeking to increase his fee. *Zarate v. Younglove*, *supra*, at 1038.

Indeed, as the *Manual* itself observes, to deprive class litigants and lawyers of the opportunity to communicate with class members in developing their case may well constitute a denial of due process. *Manual*, *supra*, Part I, § 1.41, at 50. "[C]ollective activity undertaken to obtain *meaningful* access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971) (emphasis added). Restrictions on communications between class representatives and class members can deprive the collective activity of meaningfulness and thus infringe this fundamental right. Government can reach the same policy goals without using means which restrain the flow of truthful

information concerning lawful activity pursued to vindicate collective rights.

4. The Order Infringes Freedom of Association.

Freedom of association is also implicated by the order. Membership in a group is not a prerequisite to invoking the protections of freedom of association. This Court protected the litigation-related activities in *NAACP v. Button, supra,* at 434-35, 443, not only with regard to NAACP members, but non-members as well. Moreover, this protection emcompasses freedom to seek and form new affiliations. This Court has overturned governmental regulations which deterred persons from joining groups. *E.g., Bates v. Little Rock, supra,* at 524. Whether or not the beliefs sought to be advanced by association are political in nature is immaterial. *NAACP v. Alabama,* 357 U.S. 449, 460-63 (1958).

The order in the case at bar interferes with these freedoms. It restrains communication that could catalyze associational ties. Specifically, the order impermissibly discourages association by requiring parties and counsel who seek permission to communicate to file the names of the prospective addresses. It also requires those who seek to take advantage of the exception for constitutionally protected expression to file with the court copies of all written communications and substantially complete summaries of all oral communications, as well as the names of recipients. (J.A. 124-25). Class members in an employment discrimination action will often be reluctant to communicate with persons in an adversary relationship to their employer if these communications are not kept private. Freedom of association necessarily includes privacy of association when exposure would occasion adverse consequences, including

the displeasure of those who control one's professional destiny. *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960); *NAACP v. Alabama, supra*, at 462; *Louisiana v. NAACP*, 366 U.S. 293, 296 (1961). First Amendment freedoms are protected not only against frontal attack but also against the chilling effect of more subtle governmental interference, such as disclosure of affiliations. *Cf. Bates v. Little Rock, supra*, at 522-23.

B. Constitutionally Protected Expression Does Not Lose Its Protection Merely Because It Occurs in the Context of Litigation.

Courts are not exempt from the constitutional strictures of the First Amendment. "[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." *Rodgers v. United States Steel Corp. (Rodgers I)*, 508 F.2d 152, 163 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

No doubt courts, like other governmental entities, would in some situations find it more convenient to pursue their laudable goals through methods that "broadly stifle fundamental liberties." *Shelton v. Tucker, supra,* at 488. The Constitution, however, forecloses this option. The courts are entrusted with the safeguarding of these vital liberties against governmental infringement. The courts, as guardians, must also guard themselves.

Persons who elect to vindicate their rights through civil litigation, and the lawyers who represent them, should not thereby be compelled to surrender their First Amendment rights. Government may not condition its bestowal of a right or even of a privilege on the sacrifice of a constitutional right. *See Sherbert v. Verner,* 374 U.S. 398, 404 (1963).[5/]

[5/] The congressional grant of power from which authority for federal district courts to promulgate rules and orders ultimately

Nor can it be assumed that litigants and lawyers have, by submitting to the court's jurisdiction, implicitly and voluntarily signed away their First Amendment rights. *Rodgers v. United States Steel Corp. (Rodgers II)*, *supra*, at 1006-07. Waiver of a constitutional right is not lightly inferred and every reasonable presumption against it is indulged. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Emspak v. United States*, 349 U.S. 190, 196 (1955). This Court has not been willing to find such a waiver in circumstances that fall short of clear and compelling. *Rodgers v. United States Steel Corp. (Rodgers II)*, *supra*, citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1957). *See also*

5/ footnote continued

derives specifically provides that they shall not abridge or modify any substantive right. Rules Enabling Act, 28 U.S.C. § 2072 (1976).

In re Halkin, 598 F.2d 176, 186, 189 (D.C. Cir. 1979).

Nor do attorneys by virtue of their capacity as "officers of the court" come within any exception to the First Amendment recognized as to political activities of government employees. This Court has consistently refused to assimilate private attorneys into the category of government agents merely by virtue of that title. *See Perri v. Ackerman*, 444 U.S. 193, 202 & n.19 (1979), and cases cited. But Petitioners attempt to do this very thing by identifying private attorneys with the court. Brief for Petitioners at 30. Their invocation of *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), a decision regarding restrictions on the speech of government employees, is simply inapt. *Letter Carriers* cannot be used as a premise for wholesale derogation of attorneys' First Amendment rights.

C. The Order Does Not Satisfy Traditional First Amendment Standards for Restrictions of Protected Expression.

Governmental restrictions that burden vital First Amendment freedoms are subject to the strictest scrutiny. *NAACP v. Alabama, supra,* at 460-61. To justify such a restriction, the government must demonstrate a subordinating interest which is compelling. The interest sought to be protected by the order in the instant case, as recommended by the *Manual,* is the administration of justice. It is beyond cavil that this is a protectible interest. *Wood v. Georgia, supra,* at 383. This is undoubtedly true for civil as well as criminal trials, although the Sixth Amendment hedges more stringent protections around the criminal trial. *See Hirschkop v. Snead,* 594 F.2d 356, 373 (4th Cir. 1979)(en banc).

But restrictions on First Amendment freedoms cannot be upheld merely because

they address some matter that is within governmental competence, or even because they provide a helpful means of dealing with that matter. *United Mine Workers v. Illinois State Bar Association, supra,* at 222. A mere incantation of the term "administration of justice" does not, therefore, put an end to First Amendment analysis. Nor does an incantation of the term "abuse of the class action device." Constitutional rights cannot be foreclosed by mere labels. *NAACP v. Button, supra,* at 429.

1. The Order Is Not the Narrowest Available Means.

First, "even if the governmental purpose is legitimate and substantial, it cannot be achieved by means which broadly stifle fundamental liberties when the end can be more narrowly achieved." *Shelton v. Tucker, supra,* at 488. Governmental action which encroaches upon these basic rights must be tailored to the needs of the particular

case, and framed in the narrowest possible terms that will accomplish the pin-pointed objective allowed by the Constitution and required to meet essential public needs. *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968). Broad prophylactic rules in the area of First Amendment freedoms are suspect. *NAACP v. Button, supra*, at 438. The breadth of the abridgement of First Amendment liberties must be viewed in light of less drastic means available to achieve the same purpose. *Shelton v. Tucker, supra*, at 488. This Court has indicated that even in the context of a criminal trial, a restraint upon expression should be a last resort. *See Nebraska Press Association v. Stuart, supra*, at 569.

Notwithstanding these constitutional restrictions on broad restraints of expression, the district court's order begins with a plenary prohibition of communication. (J.A. 124). Petitioners, relying on the

Manual, assert that this broad order is as narrow as possible because only a plenary prohibition on expression will forestall the machinations of imaginative miscreants bent on subversion of the class action device. *See* Brief for Petitioners at 18 & n.9. Were this argument to be given credence, it would rob the word "narrow" of all meaningful content.

Adequate narrower remedies are available. For example, attorneys who engage in misleading or abusive communications can be removed as attorneys for the class. Abusive parties can be removed as class representatives. The court could, where necessary, order corrective communications made at the party's or the attorney's expense. *See also* Wilson, *Control of Class Action Abuses Through Regulation of Communications*, 4 Class Act. Rep. 632, 636-38 (1975).

2. The Order Does Not Address a Demonstrated, Serious and Imminent Threat.

Governmental restrictions which encroach on First Amendment freedoms in the name of protecting the administration of justice must be based on a showing, not just a speculation, that there exists a substantive evil actually designed to impede the fair administration of justice. *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946); *Bridges v. California*, 314 U.S. 252, 270, 278 (1941). The *Manual* itself admits that class action abuse has been rare. *Manual, supra*, Part I, § 1.41 at 52.1. Moreover, many of the examples of class action abuse cited as a predicate for the order are not susceptible to cure by the restraint, *e.g.*, pre-filing solicitation, and agreements by the parties to strike the class action allegation. *See Manual, supra*, Part I, § 1.41 at 51-53; Brief for Petitioners at 15. Indeed, many of the activities sought to be prevented

have been found not to be harmful. *See Coles v. Marsh, supra,* at 189; *Zarate v. Younglove, supra,* at 1035-40.

A further requirement for restricting expression is that whatever substantive evil it embodies must present a grave and urgent threat to the interest sought to be protected. This Court has repeatedly held that speech which allegedly interferes with the administration of justice cannot be punished unless it is shown to present a "clear and present danger." *Landmark Communication, Inc. v. Virginia,* 435 U.S. 829, 844-45 (1978); *Pennekamp v. Florida, supra,* at 347. As this Court has stated,

> [f]reedom of speech should not be impaired. . . unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice . . . . The danger must not be remote or even probable; it must immediately imperil.

Craig v. Harney, 331 U.S. 373, 376 (1947); *Accord, Wood v. Georgia, supra,* at 385; *Bridges v. California, supra,* at 263.

The *Manual*, however, while citing *Craig* and *Bridges* for the proposition that the administration of justice is a protectible interest, turns to a different case, *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969), for the standard it suggests be used: a "reasonable likelihood" of threat to a fair trial. *Manual, supra*, Part I, § 1.41, at 47 n.33. But the *Manual* errs. A majority of courts that have addressed the issue of the standard to be used in restricting communications of litigants and lawyers have adopted a "serious and imminent threat" standard, which better comports with established First Amendment jurisprudence.[6/]

[6/] First Circuit: *United States v. Marcano Garcia*, 456 F. Supp. 1354, 1357-58 (D.P.R. 1978); Third Circuit: *Rodgers v. United States Steel Corp. (Rodgers II)*, *supra*, at 1008; Fifth Circuit: *Bernard v. Gulf Oil Co.* (J.A. 259); Sixth Circuit: *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975); Seventh Circuit: *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249, 251

Restraints, such as those in the district court's order (J.A. 125), on communications which "may tend" to misrepresent aspects of a lawsuit or "may create impressions tending . . . to reflect adversely" on persons or on aspects of the case, clearly do not meet this standard. In *Bridges v. California, supra,* at 263, 273, this Court explicitly rejected a "reasonable tendency" standard for restricting expression regarding pending litigation, in favor of a standard which required the substantive evil to be "extremely serious and the degree of imminence extremely high."

3. The Order Prevents Timely Speech.

6/ footnote continued

(7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers,* 427 U.S. 912 (1976), *accord, In re Oliver,* 452 F.2d 111, 114 (7th Cir. 1971); *Chase v. Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970); Ninth Circuit: *Zarate v. Younglove, supra,* at 1029. Contra: Fourth Circuit: *Hirschkop v. Snead,* 594 F.2d 356, 363, 373 (4th Cir. 1979)("reasonable likelihood"); Tenth Circuit: *United States v. Tijerina, supra,* at 666 (same).

The First Amendment protects not only the content of speech but its timeliness. *See, e.g., Bridges v. California, supra,* at 252. Because of the protracted nature of civil litigation, restraints on communications could last for years. *Hirschkop v. Snead, supra,* at 373. *See also Bridges v. California, supra,* at 269. The Fifth Circuit's decision invalidating the order in the instant case came almost four years after the order was entered. (J.A. 44, 277). The *Rodgers I* plaintiffs and their NAACP Legal Defense Fund counsel were subjected to a similar restraint for over two and a half years. *Rodgers v. United States Steel Corp. (Rodgers I), supra,* at 152, 155. Such delay seriously exacerbates the First Amendment problems raised by the *Manual's* model rule and order.

Petitioners assert that no harm will occur from restraining communications that cannot be corrected on appeal. Brief for

Petitioners at 21 n.15. But this argues with equal force in favor of allowing the communications to take place, and correcting any harm on appeal. Surely the First Amendment has chosen the latter option.[7/]

4. The Order Is Vague.

Finally, the *Manual* and the district court attempt to save their order from overbreadth by including a provision which exempts constitutionally protected expression. (J.A. 98, 125). This solution merely trades overbreadth for vagueness. An eminent constitutional scholar has exemplified this dilemma with a hypothetical law: "*It*

[7/] Petitioners cite *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972) as supporting their position. Brief for Petitioners at 15. However, that case held that the appellate court could not review a trial court order *allowing* communication with class members. *Weight Watchers, supra,* at 775. From a First Amendment perspective, allowing communication and suppressing it are very different propostions and are certainly not interchangeable. *See Zarate v. Younglove, supra,* at 1032 & n.14.

shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments." Because the Constitution by itself does not provide clear enough guidelines to enable a person to decide whether or not his expression is protected, such a law will deter too much that is protected. Moreover, no expression can authoritatively be said to be protected until a court has determined it to be so. L. Tribe, *American Constitutional Law* 716, 729 (1978 ed.). *See also Zarate v. Younglove, supra,* at 1025, 1042.

The district court's order has obvious similarities to this hypothetical law, and equivalent infirmities. A vague law is one which does not provide a person of ordinary prudence with notice of what he may or may not say. The average party in a class action cannot be expected to know what speech is and is not within the First Amendment's ambit. Should the prospective

speaker prudently elect to submit his dilemma to the district judge, there is no guarantee that even constitutionally protected expression will be allowed. The order provides no standards. Because the line between protected and unprotected speech may be dim, the government must work with more precise tools in this sensitive area of First Amendment freedoms. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); *NAACP v. Button*, *supra*, at 429.

CONCLUSION

For all the reasons stated, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITOL AREA AND THE GEORGE WASHINGTON LAW REVIEW, AMICI CURIAE have been served this 5th day of March, 1981, by United States Mail, postage prepaid, upon the following counsel of record:

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No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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OTHER AUTHORITIES:

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No. 80-441

IN THE

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OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Association of Trial Lawyers of America is a national association composed of lawyers regularly engaged in the trial and appeal of all types of contested matters, as well as judges, professors of law, lawyer-administrators, and other lawyers. The membership of the Association numbers approximately 40,000. The Association, through its appropriate officers and committees, has authorized its participation in this cause as *amicus curiae.* This brief is filed with the written consent of all parties.

This appeal involves the use of and the interpretation of *Sample Pretrial Order No. 15—Prevention of Potential*

Abuses of Class Actions as set forth in the *Manual for Complex Litigation,* Part II, §1.41 and as explained in Part I, §1.41.

At the invitation of the Board of Editors of the *Manual,* the Association has participated in the preparation of recent revisions of the *Manual* through an ad hoc committee appointed by the President of the Association. In both 1976 and 1980, the Association expressed to the Board of Editors their concern with the procedures recommended in §1.41 and with the chilling effect on precious First Amendment rights.

The most recent of those expressions of concern was contained in the Memorandum Report of the Association of Trial Lawyers of America to the Board of Editors of the Manual for Complex Litigation and was dated July 30, 1980:

> Preventing Potential Abuse of Class Actions
>
> The Potential abuses recounted in §1.41 of the Manual are a source of continuing concern to ATLA. The types of communications referred to appear not to be as common as the Board might fear. Perhaps our experience is jaded, however, by naivety or by the possibility that these communications are difficult to detect and often escape exposure. Particularly difficult to detect are communications which defendants direct toward class members since, in the usual case, the defendant has superior knowledge of the identities and whereabouts of class members and often has a continuing relationship which lends itself to frequent contacts or communications.
>
> The danger perceived in this area, however, is not with the necessity for preventing potential abuses, but with the procedures to be utilized to accomplish that end. In its 1976 Report, ATLA expressed concern over the potential chilling effect of non-communication orders and rules on precious First Amendment rights. We reiterate that concern here and urge the Board to consider §1.41 in light of the June 19, 1980, *en banc* decision of the United States Court of Appeals for the

Fifth Circuit in *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980). That decision, which was not rendered until after preparation of the Tentative Draft, reversed the very case referred to in the Draft and cited at Footnote 42c. The potential for inadvertent abuse of constitutionally protected freedoms may outweigh the potential for abuse of the class action process.

The Association appears in this cause as *amicus curiae* to express its continuing concern with the effect upon First Amendment freedoms of the imposition of the order and rule in §1.41 of the *Manual* in a non-selective manner and based upon anticipation of abuse of class action procedures.

SUMMARY OF ARGUMENT

This appeal involves the constitutionality of *Sample Pretrial Order No. 15* as recommended and published in the *Manual for Complex Litigation,* §1.41 of Parts I and II. The order purports to prevent potential abuses of class actions by prohibiting all communication by parties in the class action and their counsel with actual or potential class members who are not formal parties in the action. The *Manual* recommends that the order be issued pretrial in all class actions in anticipation of potential abuses. The order was, in fact, imposed upon counsel and parties in this Title VII class action when they openly opposed a conciliation agreement between the defendants and the Equal Employment Opportunity Commission.

The conduct of plaintiffs and their counsel, which resulted in the imposition of this order, was protected activity under the First Amendment as interpreted and applied by this Court. Further, the imposition of the order as recommended by the *Manual* and as issued herein is inherently unconstitutional as a prior restraint on free speech. The district court was not faced with a threat of "direct, immediate, and irreparable damage" to the judicial process and the *Manual* does not contemplate such a threat as the basis for issuing the order.

Apart from the unconstitutional circumstances under which the order was issued, it is unconstitutionally vague and overbroad. Its terms are such that no reasonably intelligent person, lawyer or lay person, could be expected to understand and abide by the order. Its reach is far beyond that required by the situation confronting the district court—and the *Manual* would not require any threat to the judicial process, it would "anticipate" abuse. No consideration was given to reasonable, available, less severe alternatives.

The order purports to exclude First Amendment rights asserted by the parties or counsel. However, the order obviously "chills" the assertion of one's constitutional rights, as one would assert them at peril of being held in criminal contempt of court. Any communication is a per se violation of the order.

No Circuit Court has upheld the validity of the order issued herein. The Fifth Circuit, sitting *en banc,* held it to be unconstitutional in this action. That decision should be affirmed by the Court.

ARGUMENT

I

THE DISTRICT COURT'S ORDER IS AN UNCONSTITUTIONAL "PRIOR RESTRAINT" ON SPEECH AND CONDUCT

Prior restraints have been viewed with great displeasure in the American Legal system, due largely to the severe impact they place on judicially guarded First Amendment rights. *Near v. Minnesota,* 283 U.S. 697 (1931). Though prior restraints on speech are not regarded as unconstitutional per se, this Court has repeatedly stated that "any system of prior restraints comes to this court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v Sullivan,* 372 U.S. 58, 70 (1968). *See also Nebraska Press Association v. Stuart,* 427 U.S. 539, 556-59

(1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-59 (1975); *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). The burden of justification for a prior restraint is, therefore, far greater than that imposed in cases dealing only with subsequent restrictions on freedom of speech.

It is generally accepted that a prior restraint of speech is a "predetermined judicial prohibition restraining specified expression . . ." imposed by a judicial decree, the violation of which is punishable by a contempt citation. *Hirschkop v. Snead,* 594 F.2d 356, 368 (4th Cir. 1979); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975). This punishment of contempt is the prime distinguishing feature between a "prior restraint" and a criminal statute that prohibits certain expression. In a prosecution for the violation of the latter an individual is protected by the full panoply of criminal procedural safeguards, and is free to assert the unconstitutionality of the statute as a defense. *See Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969). In contrast, an individual who violates an injunction is precluded from attacking its constitutional validity in a subsequent contempt proceeding. *Walker v. City of Birmingham,* 388 U.S. 307 (1967). The proper method of challenge to an injunction lies in a prior application to the court for modification or dissolution, or in a direct appeal, not in a constitutional attack after its violation. *Walker, supra,* 388 U.S. at 317. As this Court noted in *Nebraska Press Association v. Stuart, supra,* a prior restraint has "an immediate and irreversible sanction," the threat of which doesn't merely "chill" speech but rather "freezes it." 427 U.S. at 559.

For a prior restraint to be lawful it "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints." *Southeastern Promotions, Ltd. v Conrad, supra,* 420 U.S. at 559. The general rule is that such restraint is justified only if the expression to be re-

strained will "surely result in direct, immediate, and irreparable damage." *New York Times Co. v. United States, supra,* 403 U.S. at 730. As this Court stated in *New York Times,* it is not a question of probabilities or mere speculation of harm, but rather a question of whether there was a substantial certainty of harm, i.e., the "publication must inevitably, directly, and immediately, cause an occurrence of an event kindred to the imperiling of a transport already at sea . . ." 403 U.S. at 726-27.

There are two additional prerequisites to a constitutionally permissible prior restraint. First, the restraint must be the least restrictive means of preventing the threatened harm. It must be drawn as narrowly as possible, and it cannot be sustained if reasonable alternatives exist that would impact less severely on First Amendment rights. *Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968). Second, the restraint "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559

A. The Conduct of a Lawyer in the Course of a Legal Action is Constitutionally Protected.

The right, indeed, the duty of courts to protect their procedures and to take all reasonable means of ensuring a fair trial to every litigant is beyond question; and, clearly, the courts have the inherent power to take appropriate remedial measures "to protect their processes from prejudicial outside interferences." *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966). When a lawyer engages in conduct which interferes with those processes, that lawyer is subject to censure. *Id.* As an officer of the court, a lawyer has a higher duty than a lay person to protect the judicial process and to ensure its fairness; certainly, they are subject to more disciplinary sanctions. *Hirschkop v. Snead, supra,* 594 F.2d

at 366. So, when the right of a lawyer to free speech conflicts with the right of litigants to a fair trial, the rights of litigants must take precedence. *Chicago Council of Lawyers v. Bauer, supra,* 522 F2d at 248.

However, lawyers do enjoy the right of free speech and an order which denies those First Amendment rights to a lawyer must be measured against and protected by constitutional requirements. The Seventh Circuit has suggested that we should be even more reluctant to silence attorneys representing a plaintiff class in an action such as this action.

> Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi private institutions or governmental entities. . . . The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.
>
> *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 258.

No lawyer could competently prepare a class action for trial under the restrictions of the district court's order. They are prohibited from initiating any contact with potential or actual class members not a formal party—an essential source of testimony in a Title VII class action. They may not even inform those persons that the class action has been filed on their behalf. Plaintiffs' lawyers were effectively cut off from the market place in which free speech should be tested. Quite possibly, it is a violation of due process to deny an attorney access to witnesses. *Zarate v. Younglove,* 86 F.R.D. 80, 97-8 (C.D. Calif. 1980).

To the extent that plaintiff's lawyers were employed by the NAACP Legal Defense Fund, their First Amendment right to contact aggrieved citizens and to counsel them as to their legal rights, including litigation, has been previously litigated and firmly established by this Court in *NAACP v. Button,* 371 U.S. 415 (1963) and the line of cases following it. *See In re Primus,* 436 U.S. 412 (1978); *United*

Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel State Bar,* 377 U.S. 1 (1964).

As in *Button,* the subject matter of the case at bar is racial discrimination. The only difference is that in the instant case the employees had a choice between a conciliation offer and a lawsuit, whereas in *Button* there was no conciliation offer and the choice was whether or not to participate in a lawsuit.

On authority of the *Button* line of cases, the communications between formal parties to the suit and potential class members, also forbidden by the plenary order, is at least equally protected activity under the First Amendment. *See United Transportation Union v. State Bar of Michigan, supra; United Mine Workers v. Illinois State Bar Association, supra; Brotherhood of Railroad Trainmen v. Virginia ex rel State Bar, supra.* As this Court stated in *United Transportation Union,* "The common thread running through *our decision in NAACP v. Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a federal right within the protection of the First Amendment." 401 U.S. at 585.

B. The District Court's Order Was Constitutionally Infirm in Its Genesis.

The order imposed upon counsel and parties by the district court, hereafter referred to as the "*Bernard* order," was taken verbatim from the *Manual for Complex Litigation,* Part II, §1.41, *Sample Pretrial Order No. 15.* The accompanying text, Part I, §1.41, exhorts trial judges "to anticipate abuse" in class actions under Rule 23, sets forth "potential abuses," and recommends "timely action" by local rule, by order, or by both means. Clearly, the thrust of the text is that the district courts should apply the recommended restrictions on communications with class members

prior to the occurrence of, or even the threat of, any abuse of the class action process. Obviously that approach cannot meet the "direct, immediate, and irreparable damage" test. Far from protecting an imperiled "transport already at sea," the *Manual* recommends issuance of the order when the vessel is still at the dock, "anticipating" the voyage.

Inconsistently, the *Manual* acknowledges that these "potential abuses" occur rarely:

> It must be noted however, that generally, the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they *support* the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order. *Manual,* Part I, §1.41, pgs. 36-37 (emphasis supplied).

"Support" hardly rises to a threat of "direct, immediate, and irreparable damage" to the judicial process.

The *Manual* does caution that the recommended order "is not intended to be either a permanent or an absolute prohibition of contact with actual or potential class members," and proceeds to recommend a prompt hearing after entering the order for the purpose of relaxing the order and for the presentation of proposed communications with class members. The final paragraph of the recommended order provides for that hearing. Interestingly, this was the one paragraph of the recommended order omitted by the trial court in the *Bernard* order.

This Court has never spoken on the question of what degree of consideration should be given to the recommendations of the *Manual for Complex Litigation.* We would acknowledge that the *Manual* is entitled to great respect; however, we would also contend that it is not entitled to the deference of regulations issued by agencies charged with the enforcement of Acts of Congress. The Ninth Circuit has limited the role of the *Manual* as a source of judicial authority, ". . . in any case, the *Manual* cannot serve as a

source of judicial power because the committee that drafted it possessed authority only to issue recommendations. *See Manual for Complex Litigation, Xiii - Xix* (1973)." *Pan American World Airways, Inc. v. United States District Court for Central District of California,* 523 F.2d 1073, 1078 (9th Cir. 1975).

The fact that the *Bernard* order involves the judicial administration of justice does not bring it within a recognized exception permitting prior restraints. In fact, quite the opposite is true. Even in the context of a criminal defendant's right to a fair trial "the barriers to prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 570. Our courts have articulated standards for judging when a prior restraint will be constitutionally permissible in the context of the fair administration of justice. The Fifth Circuit and others have held that "[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be an imminent, not merely a likely, threat to the administraiton of justice. The danger must not be remote or even probable; it must immediately imperil." *U.S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974). This standard comports with the *New York Times* test of substantial certainty of "direct, immediate, and irreparable harm." Clearly, the *Bernard* order fails to meet the requisite standard both in its conception and by reason of the complete absence of findings by the trial court indicating any imminent threat to the administration of justice. *Bernard v. Gulf Oil Company, supra,* 619 F.2d at 466.

II
THE DISTRICT COURT'S ORDER IS UNCONSTITUTIONALLY VAGUE

The order imposed in this action is also unconstitutional because it is impermissibly vague.

> Vague rules that restrict expression also offend the first amendment because they chill freedom of speech. Their uncertain meanings require those persons who are subject to the rule to "steer far wider of the unlawful zone, . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964).
>
> *Hirschkop v. Snead, supra,* 594 F.2d at 371.

The order sets forth four specific areas of communication with class members which are prohibited to both lawyers and lay parties:

> (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P. and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administraiton of justice.

But, these four prohibitions are introduced with the statement, "The communications forbidden by this order include, but are not limited to . . . ." What other communications are forbidden? The only clue within the order follows the recitation of the four forbidden areas: "The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order."

No lawyer, far less a lay party, could determine with any certainty from the above language what they may or may not do thereafter in the preparation of the action for trial.

"All other ethical, legal and equitable obligations" might be meaningful to a lawyer. It should mean, "Conduct yourself as an ethical lawyer." If so, it is superfluous; if not, it is unconstitutionally vague. But what does it mean to a lay party?[1]

Paragraph (d), above, prohibits communications "which may tend to misrepresent." It would be difficult, but feasible, to abide by an order which prohibited communications "which misrepresent;" it is impossible to interpret safely "which may tend to misrepresent." This phrase was found to be both unconstitutionally vague and overbroad in *Zarate v. Younglove, supra,* 86 F.R.D. at 103.

And, how does one comply with the prohibition against misrepresenting "potential Court orders?" That requires a prescience which few trial lawyers, or judges, possess!

These vague provisions would certainly "chill" the activities of parties and counsel. The wise person seeing a sign, "Danger—Thin Ice," will give it a wide berth; the cautious will not go ice skating.

III
THE DISTRICT COURT'S ORDER IS UNCONSTITUTIONALLY OVERBROAD AND IGNORES REASONABLE ALTERNATIVES

A constitutional prior restraint must be carefully drafted. It must be drawn as narrowly as possible and it will not be sustained if there are reasonable alternatives which will have a less severe impact on First Amendment rights. *Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne, supra.*

---

[1]Compare, *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 255-56 (7th Cir. 1975) holding unconstitutionally vague the phrase, "or other matters that are reasonably likely to interfere with a fair trial." Accord, *Hirschkop v. Snead,* 594 F.2d 356, 373 (4th Cir. 1979).

A. The District Court's Order Is Unconstitutionally Overbroad

> In a series of decisions this court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker,* 364 U.S. 479, 488 (1960) (footnotes omitted).

With the above constitutional guidelines from this Court, the lower courts have adopted varying standards to determine to what extent judicial orders may curtail the First Amendment rights of litigants and counsel to comment on pending litigation. In *Hirschkop v. Snead, supra,* the Fourth Circuit held that rules proscribing comments on pending litigation are constitutionally prohibited unless there is a "reasonable likelihood" that such dissemination will interfere with the administration of justice. 495 F.2d at 370. In *Chicago Council of Lawyers v. Bauer, supra,* the Seventh Circuit adopted a narrower and more restrictive standard, holding that comments on pending litigation can be constitutionally restrained only if they pose a "serious and imminent threat of interference with the fair administration of justice." 522 F.2d at 249. The two courts agreed that rules prohibiting lawyers' comments about civil trials were unconstitutional and the Fourth Circuit included all bench trials in their ruling. 594 F.2d at 371-72, 373; 522 F.2d at 257-59. Of course, being a Title VII action, the action here involved was a civil action which should have resulted in a bench trial. The courts are in unanimous agreement that the interest of the judiciary in the proper administration of justice does not license a blanket exception to the First Amendment. *See Wood v. Georgia,* 370 U.S. 375 (1962); *Craig v. Harney,* 331 U.S. 367 (1847); *Pennekamp v. Florida,* 318 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 252 (1941).

The order at issue is inherently overbroad as published in the *Manual* and unconstitutionally overbroad as issued. It was taken verbatim from the *Manual* with no attempt to apply it specifically to the alleged abuses. Consequently, the order prohibits abuses which could not occur in this action and it authorizes conduct which could not occur in this action.

For example, paragraph 2 (c) of the *Bernard* order forbids solicitation of requests to opt out under Rule 23 (b) (3). This conduct could not occur in this action. First, Rule 23 (b) (3) contains no provision for a class member to opt out; one opts out under Rule 23 (c) (2) (A). Secondly, Title VII class actions are (b) (2) class actions. Rule 23 contains no provision for opting out of a (b) (2) class action.

The *Bernard* order also contains an exception "in the performance of the duties of a public office or agency (such as the Attorney General) . . . ." Of course, neither the Attorney General nor any other government attorney was involved in this action.

Far from being "no greater than is necessary or essential," the *Bernard* order reached out to forbid all communication "concerning this action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court." Simply, the order established a "permit" system. *Zarate v. Younglove, supra,* 86 F.R.D. at 104.

The alleged threat to the court's management of this class action is described by Petitioner as follows:

> On May 22, 1976, four days after this action was filed, attorneys for Respondents attended a meeting of actual and potential class members (J.A. 115, 118), and according to affidavits filed in this case, discussed with the potential class members the issues involved in this action, answered questions from the audience, and explained the administrative and legal problems inherent in fair employment litigation. (J.A. 115, 116, 118).

> After the meeting, Gulf's counsel, by emergency motion, represented to the district court that it had learned that an attorney for Respondents advised the participants at the meeting to mail back the checks they had received from Gulf, since by prosecuting the present action Respondent's attorney could recover at least double the amount which was paid under the conciliation agreement. (J.A. 22, 23, 24). Gulf's emergency motion sought an interim order limiting communications between potential class members and all parties and their counsel to this lawsuit. (J.A. 21, 25). On May 28, 1976, District Judge Steger, ruling in Chief Judge Fisher's absence, granted Gulf's motion and entered the interim order. (J.A. 44).
>
> *Brief for the Petitioners,* pg. 5.

These allegations describe an attack on the conciliation agreement negotiated between Petitioner and the Equal Employment Opportunity Commission. Even assuming that the conciliation agreement was entitled to the court's protection (J.A. 71-80), a highly debatable issue in itself, or that Respondents has misrepresented the context and effect of that agreement, the *Bernard* order does not specifically address that issue in any manner. If this issue was intended to be included in the prohibition of communications "which may tend to misrepresent the status, purposes and effects" of the action or "actual or potential Court orders" or to reflect adversely on the parties or the court (paragraph 2 (d) of the order, *supra),* it is unconstitutionally vague and broad as discussed above.

Indeed, the order in question "hangs over [people's] heads like a Sword of Damocles." *Arnett v. Kennedy,* 416 U.S. 134, 231 (1974). Counsel's decision to seek prior approval of the court before attempting to communicate with potential class members aptly demonstrates that "the value of the sword of Damocles is that it hangs—not that it drops." *Id.*

may be made by the parties or their counsel free of restraint." *(Brief for Petitioners,* pg. 33.) Petitioner proceeds to acknowledge that communications by respondent parties or their counsel would be tested in criminal contempt proceedings and projects that the determination would be based upon

> . . . the applicable constitutional test for solicitation in effect at the time the violation is charged. Presently, this would require an analysis by the court of whether the solicitation was commercial, under the standards of *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978) or whether the solicitation was a form of political expression under the standard of *In re Primus, supra.* Thus, the order's exception allows any court imposed prohibition on speech to be constitutionally challenged by the one charged with its violation and then only after all the safeguards of the criminal justice system are fulfilled.[37]
>
> 37. Violations of the order would be punished by criminal contempt since the objective would be to vindicate the authority of the court. *See Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911).

The means of enforcing the order in issue, criminal contempt, are not disputed. Petitioners acknowledged the means of enforcing this order before the Fifth Circuit:

> the appellees accept that the means of enforcement intended is the contempt power of the court, and we agree.[14]
>
> 14. Contempt here would be criminal because used to punish past misconduct. *In re Timmons,* 607 F.2d 120, 123-24 (5th Cir. 1979).
>
> *Bernard v. Gulf Oil Co.,* 619 F.2d 459, 468-69 (5th Cir. 1980).

And, of course, in that criminal contempt proceeding, the burden would be upon the attorney or party asserting their First Amendment rights.

> The conditional defense is accompanied by a second chilling effect, the risk of trial on criminal contempt charges, with guilt or innocence possibly turning on

whether one's assertion of constitutional protection has been made in "good faith." Moreover, the omissions and ambiguities of the order and possible differing constructions as to when, if at all, one is protected against contempt, accentuate the chilling effect.[21]

21. For example, in addition to the general ban on communications, subparagraph (a) of paragraph (2) expressly forbids solicitation. Prudent counsel very well may conclude that he cannot safely rely upon asserting constitutional protection in the face of this specific ban. If there is a "good faith" defense can counsel be in good faith if he does what he is expressly ordered not to do? As one commentator has noted:

> The proviso exempting constitutionally protected communication does not eliminate, indeed, it highlights the overbreadth and resultant chilling effect of the Manual's proposed rule.

Note, 88 Harv. L. Rev. 1911, 1922 N. 74 (1975). See also *Zarate v. Younglove,* 22 FEP Cases 1025, 1042 (C.D. Cal, 1980).

Bernard v. Gulf Oil Co., 619 F.2d 459, 471 (5th Cir. 1980). See also, *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 251 (7th Cir. 1975) (Burden upon one "charged with violating such a rule . . .")

It is not at all certain that the "good faith" belief in the First Amendment status of one's non-judicially approved communications would be a defense in criminal contempt proceedings. Petitioners have so contended;[2] but it is at best a potential defense and hardly security for the assertion of the First Amendment rights of respondent parties and their counsel. As one court has observed, this supposed defense "simply exchanges overbreadth for vagueness." *Zarate v. Younglove, supra,* 86 F.R.D. at 103-04. No one has contended that the mere filing of an alleged First Amendment communication is a defense.

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[2]*Bernard v. Gulf Oil Co.,* 619 F2d 459, 470 (5th Cir. 1980).

V

THERE IS NO CONFLICT BETWEEN CIRCUITS AS TO THE VALIDITY OF THE DISTRICT COURT'S ORDER.

Petitioner asserts that there is a conflict between the Fifth Circuit's *en banc* opinion herein and the Second Circuit's opinion in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972). *Brief for Petitioners,* pgs. 13, 21-22 n. 15. In fact, there is no conflict among the Circuits as to the validity of the substance of the order issued in this action. *No Circuit Court has approved the order* issued in this action and recommended in the *Manual for Complex Litigation,* Part I, §1.41.[3]

The Fifth Circuit held the challenged order unconstitutional in the instant action.[4] The Third Circuit has held that the content of the order is neither authorized as a local district court rule[5] nor as a district court order.[6] The Fourth Circuit and the Seventh Circuit have declared unconstitutional bar association rules designed to achieve many of the same purposes as the challenged order but not aimed specifically at class actions.[7]

---

[3]The *Manual* cites *Weight Watchers* as authority for the almost unreviewable discretion of the trial court to regulate communications between counsel and class members and potential class members. *Manual for Complex Litigation,* Part I, §1.31 n.33. At best, this is an overstatement of the holding in *Weight Watchers* as discussed later in this section, *infra,* at pg. 20.

[4]619 F.2d at 477-78.

[5]*Rodgers v. United States Steel Corp.*, 508 F.2d 152, 163-65 (3d Cir. 1975). While declining to hold the rule unconstitutional, the court recognized that it was a "prior restraint." 508 F.2d at 162, 164.

[6]*Coles v. Marsh,* 560 F.2d 186, 189 (3d Cir. 1977). Again declining to rule on a constitutional basis, the court sets forth a requirement for a "specific record" showing the threat to the court, *Id.*, which would satisfy First Amendment requirements.

[7]*Hirschkop v. Snead,* 594 F.2d 356 (4th Cir. 1979) *(en banc); Chicago Council of Lawyers v. Bauer,* 522 F.2d 252 (7th Cir. 1975).

The order at issue in *Weight Watchers, supra,* differed drastically from the order issued herein. The order challenged there was quite specific and designed to remedy a specific abuse.[8] The Second Circuit held that the order was not a "final decision" appealable under 28 U.S.C. §1291[9] nor reviewable under a petition for mandamus.[10] Thus, the court did not consider the merits of the order involved herein. Considering the relatively insignificant effect of the order before the Second Circuit, we do not challenge that decision.

The only potential conflict among the Circuits is whether this order, when issued, is subject to review prior to a final judgment. The Third Circuit has held that the order, coupled with a local district court rule to the same effect, is not reviewable under 28 U.S.C. §1292 (a) (1) but is reviewable under 28 U.S.C. §1651; therefore, they did not reach the question of whether the order [rule] is reviewable under 28 U.S.C. §1291. *Rodgers v. United States Steel Corporation,* 508 F.2d 152, 159-65 (3rd Cir. 1975); *Coles v. Marsh,* 560 F.2d 196 (3rd Cir. 1975) (order reviewed on petition for writ of mandamus). The Second Circuit would perhaps reject those results under the holding of *Weight Watchers, supra;* but the issue is totally different from that which they decided. Since the *en banc* decision below in this action, the Fifth Circuit has reviewed and vacated a local district court rule embodying the recommendations of the *Manual* under a petition for writ of mandamus. *In re Norton,* 622 F.2d 917 (5th Cir. 1980).

There is a conflict among District Courts as to the validity of the order in issue. In *Zarate v. Younglove, supra,*

---

[8]In the absence of the assigned trial judge, another district judge issued the order at issue herein to preserve the status quo. Upon the return of the assigned judge, a prompt hearing was held and a modified order issued which restored communication with class members with the right of the class members' counsel to be present. It was only the latter order which was appealed. 455 F.2d at 772.

[9]455 F.2d at 722-73.

[10]455 F.2d at 775.

the court found the proposed order to be vague and overbroad and posing an impermissible prior restraint. Absent a showing of a serious and imminent threat, the court declined to issue the order. 86 F.R.D. at 94-106. The constitutionality of a local district court rule adopted in accordance with the *Manual's* recommendation was upheld in *Waldo v. Lakeshore Estates, Inc.* 433 F. Supp. 782 (E.D. La. 1977) (that rule would now be invalid under the Fifth Circuit decision in this case). Without reaching the constitutional question, the District of Kansas upheld its authority to issue this same order. The court noted "that plaintiff's attorney files a very great number of asserted class actions in this court, and the nature and extent of his requested discovery becomes a point of contention in almost every one." *Peals v. Southwestern Bell Telephone Company,* Case No. 78-68-C5, Slip opinion, September 13, 1977. The number and complexity of discovery requests in prior cases is hardly a proper subject of judicial notice and would scarcely seem to justify the imposition of the order in question.

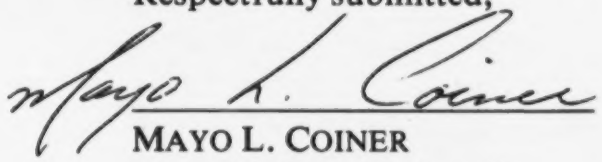
As trial lawyers, we recognize the pressures under which a trial judge performs; so we do not mean to castigate the trial judge for issuing the *Bernard* order and ignoring the alternatives. He was absent when the original order was issued. Upon his return, the situation consisted of an existing order prohibiting communication, defense attorneys requesting far greater relief than the situation required—if any relief was required, and a recognized publication recommending, even urging, that he issue the order and assuring him that his action was not reviewable.

Unfortunately, the result *is* unconstitutional.

CONCLUSION

Therefore, for the foregoing reasons, *amicus curiae* Association of Trial Lawyers of America respectfully submits that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 1981, true and correct copies of the foregoing Brief for *Amicus Curiae,* the Association of Trial Lawyers of America, were deposited in the United States Post Office with first class postage perpaid and properly addressed to the following parties to this action and others required to be served:

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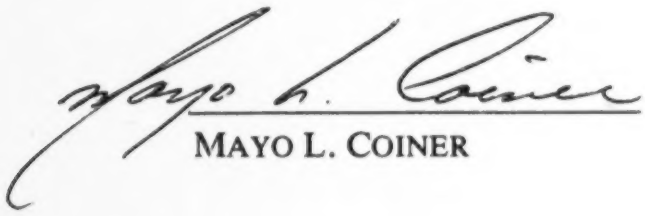

MAYO L. COINER

No. 80-441

In the Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,

Petitioners,

vs.

WESLEY P. BERNARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE CHICAGO COUNCIL OF LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The Chicago Council of Lawyers, with the written consent of all parties, submits this brief as amicus curiae, in support of the Respondents.

INTEREST OF THE AMICUS CURIAE

The Chicago Council of Lawyers (the "Council"), a member of the American Bar Association, is an association of approximately 1300 lawyers, most of whom are admitted to practice before the United States District Court for the Northern District of Illinois (the "District Court"). Many members of the Council practice regularly as counsel in class litigation before the District Court. Council members have represented both classes and individuals in class actions involving alleged violations of the United States Constitution and various civil rights statutes as well as in class suits arising under other federal legislation.

Until recently, the speech activities of Council members and other attorneys involved in class litigation before the District Court were governed by Civil Rule 22 of the United States District Court for the Northern District of Illinois ("Rule 22").[1] Rule 22, entitled

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[1] Rule 22 provided as follows:

> In every potential and actual class action under Rule 23, F.R. Civ. P. all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a

(footnote continued on next page)

motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraphs(b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

(footnote continued on next page)

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

"For the Prevention of Potential Abuses of Class Actions," was patterned after the rule recommended in the Manual for Complex Litigation[2] and was substantially identical to the non-communication order entered by District Court Judge Joe J. Fisher in the case at bar.[3] It subjected to the prior approval of the District

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[2] Manual for Complex Litigation, reprinted in 1 J. Moore, Moore's Federal Practice Pt. II, §1.41 (2d ed. 1980) [hereinafter cited as Manual].

[3] Unlike Judge Fisher's order and the Manual's proposed rule, Rule 22 did not contain an exception for constitutionally protected speech. However, as argued at p. 32, n. 5, infra, that exception does not cure the constitutional infirmities of a rule or order generally restricting communications.

Court almost all communications between formal parties in an actual or potential class action, or their counsel, and actual or potential members of the class.

The Council's interest in the issues raised by restrictions upon communications of litigants and their attorneys has been long-standing. In Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), it successfully challenged the constitutional validity of several local rules which severely curtailed the rights of litigants and attorneys to comment on pending criminal and civil litigation. Following the Bauer decision, the Council urged the Executive Committee of the District Court to repeal Rule 22. In requesting abrogation of the rule, the Council took the position adopted in the

en banc opinion of the Court of Appeals for the Fifth Circuit in the case at bar. It argued that Rule 22, like the rules struck down in Bauer, was an unconstitutionally overbroad and vague prior restraint on the First Amendment rights of attorneys, litigants, and potential litigants. It contended also that the enactment of Rule 22 exceeded the rule-making authority of the district courts in that it conflicted with the objectives of Fed. R. Civ. P. 23.

The Council's most recent action concerning Rule 22 was the submission of an amicus curiae brief in American Civil Liberties Union, et al. v. McMillen, 79-1576 (7th Cir. 1979), in support of a petition for issuance of a writ of mandamus directing the District Court to re-

scind an order entered pursuant to Rule 22 and to repeal Rule 22 itself. The order prohibited the parties and their attorneys in Jane Does, et al. v. City of Chicago, et al., 79 C 789 (N.D. Ill. E. Div.), a class action challenging the constitutionality of strip searches conducted by members of the Chicago Police Department, from "soliciting" class members. The petition for a writ of mandamus was denied.

In January, 1981, the judges of the District Court repealed Rule 22, after repeated requests by the Council and in light of the Fifth Circuit's holding in this case that a non-communication order virtually identical to Rule 22 was an unconstitutional infringement upon the First Amendment rights of attorneys and litigants. The outcome of this petition,

therefore, has special significance in the Northern District of Illinois. This Court's decision on the validity of non-communication orders will likely determine the future here of a rule which profoundly affects the rights of Council members and their clients to communicate freely regarding class litigation in which they are involved. The Council, thus, has a direct and immediate interest in the resolution of this case.

SUMMARY OF ARGUMENT

Restrictions on communications between parties to an actual or potential class action, or their counsel, and individual members of the actual or potential class seriously impinge upon their well-established constitutional rights to free speech, association, and meaningful access to the courts. Under

either prior or subsequent restraint analysis, a court may not restrain such communications in the absence of a clear showing that they are in direct and serious conflict with an important public or private interest and that such restriction is necessary to protect that interest. While the fair administration of justice is admittedly a significant governmental interest, it may not be invoked as a talismanic justification for the wholesale rejection of First Amendment rights. The constitution requires, moreover, that any ban on communications be tailored narrowly and specifically to avoid unnecessarily inhibiting the exercise of First Amendment freedoms.

The non-communication order entered in the case at bar, like the model rule and order after which it is patterned, does not satisfy constitutional standards.

It is based solely on speculative and theoretical fears that the parties or their attorneys may engage in abuses of the class action device sometime in the future. The general proscription against all communications, direct and indirect, is both vague and overbroad. It encompasses speech that presents no threat to the fair administration of justice as well as communications that will actually further that goal. The order improperly deters activities falling within the protection of the First Amendment. The Court of Appeals for the Fifth Circuit correctly held that such wide-ranging restrictions on communication exceed constitutional limitations.

In addition, general orders prohibiting all communications concerning class actions are in direct conflict with the

policies embodied in Fed. R. Civ. P. 23 and therefore, exceed the authority of the district courts to enter orders and enact rules so long as they are consistent with the Federal Rules of Civil Procedure. Rule 23 was intended to provide a mechanism for resolving suits involving common factual and legal issues and common claims for relief in a manner that would be economical, efficient, and effective for both the parties involved and the judicial system.

A communications bar presents formidable obstacles to the achievement of these objectives. It deprives the parties, their counsel, and the court of essential information in deciding whether to proceed on a class basis. It interferes with the proper maintenance of a class action by preventing free development of litigation strategy, discovery, and trial preparation.

It inhibits the flow of information to class members on matters affecting their interests. A communications bar thus, hinders meaningful access to the courts for both class representatives and class members.

While the district courts are not without power to monitor communications in the class action context, they may do so only in a manner that comports with Rule 23. This requires a specific record showing that the communications in question constitute particular abuses of the class action device. Any restriction on communications must, futhermore, be drawn to provide the narrowest possible relief from such abuses. The order entered in the case at bar fails to satisfy these requirements.

The en banc decision of the Court of

Appeals for the Fifth Circuit invalidating the non-communication order should be affirmed.

ARGUMENT

I

GENERAL RESTRICTIONS ON COMMUNICATIONS CONCERNING CLASS LITIGATION UNCONSTITUTIONALLY IMPINGE UPON FIRST AMENDMENT FREEDOMS

A. COMMUNICATIONS BY PARTIES TO CLASS LITIGATION AND THEIR COUNSEL ARE PROTECTED BY THE FIRST AMENDMENT

The order entered in the case at bar, like the proposed order and rule found in the Manual, generally prohibits parties to a class action and their attorneys from communicating, directly or indirectly, with potential or actual members of the class without the prior approval of the district court. It then sets forth a non-exclusive list of prohibited communications: (1) solicitation of legal representation, (2) solicitation

of fees and expenses from class members, (3) solicitation of requests to opt out from the class action, and (4) communications tending to misrepresent the nature and status of the litigation.

The communicative activities proscribed by this order, as well as the order and rule recommended in the Manual, are protected by the First Amendment to the United States Constitution. As this Court has said,

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give [individuals] the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them..., statutory rights which would be vain and futile if [individuals] could not talk together freely as to the best course to follow....And the right... to advise concerning the need for legal assistance - and most importantly, what lawyers [an individual] could confidently rely on - is an insep-

> arable party of this constitutionally guaranteed right to assist and advise each other.

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5-6 (1964). "Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." United Transportation Union v. Michigan Bar, 401 U.S. 576, 585 (1971).[4] It includes efforts to

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[4] Petitioners' suggestion at p. 29, n. 29 of their brief that restrictions on communications after initiation of a lawsuit do not impinge upon this right ignores that access to the courts must be meaningful. A ban on communications can effectively deprive formal parties and class members of meaningful access to the courts for the redress of grievances. See discussion infra, pp. 41-45.

finance the costs of litigation. "That right [of access to the courts] would be a hollow promise if courts could deny associations of workers or others the means of establishing their members to meet the costs of legal representation." 401 U.S. at 585-586.

The First Amendment's protection of such activity does not depend on the nature of the underlying rights sought to be vindicated. The present litigation involves the assertion of civil rights, and therefore, falls squarely within this Court's decision in NAACP v. Button, 391 U.S. 415 (1963). However,

> the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it, the right of assembly, are not solely religious or political ones. And the rights

> of free speech and a free press are not confined to any field of human interest."

United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 224 (1967) (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)). See also Great Western Cities, Inc. v. Binstein, 476 F. Supp. 827, 834 (N.D. Ill.), aff'd, 614 F.2d 775 (7th Cir. 1979) (according First Amendment protection to activities of association organized to pursue legal remedies for claimed securities fraud against members and to advise others of their rights and recommend legal counsel). Thus, the First Amendment protects communications relating to "civil rights" as well as "commercial" class litigation.

The constitutional protection afforded the associational activities of parties involved in class litigation extends to lawyers retained by them to represent

their interests. In Brotherhood of Railroad Trainmen v. Virginia, this Court found constitutionally protected a union's activities which involved advising injured union members not to settle any claims for damages without first seeing a lawyer and recommending that they consult counsel selected by the union. The Court held that such activity could not be enjoined and noted, "of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." 377 U.S. at 8. See also In re Primus, 436 U.S. 412, 431-432 (1978). The extension of such protection to lawyers recognizes that an attorney speaks for his client regarding all matters for which he is retained.

Protection of lawyers' communications regarding class litigation derives from practical necessity as well. As the Court of Appeals for the Seventh Circuit stated in invalidating a local rule prohibiting comment by attorneys involved in civil litigation:

> Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities....The lawyer for the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.

Chicago Council of Lawyers v. Bauer, 522 F.2d at 258.

The solicitation activity prohibited in this case also is protected by the First Amendment. Any alleged acts of solicitation by the respondents' attorneys in this litigation involving charges of

racial discrimination in employment are plainly within the rule, enunciated by this Court in NAACP v. Button and In re Primus, that solicitation of legal representation for the purpose of vindicating political and civil rights is constitutionally protected. The fact that respondents have requested money damages and attorneys' fees does not deprive solicitation activity of constitutional protection. See In re Primus, 436 U.S. at 429-430.

In fact, the Council believes that the distinction between "public interest" lawsuits and "commercial" litigation, drawn by this Court in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), is not appropriate in the context of solicitation by counsel for formal parties in purported or actual class litigation. The class action situation is quite different

from the circumstances of Ohralik, where the solicitation activity in question was directed at initially obtaining a client to institute a lawsuit. In contrast, the attorney for the formal party already has an individual client, whose interests he is bound to pursue, and depending on the stage of the litigation, either purports, or has been judicially determined, to represent adequately the interests of the class. Solicitation of additional class representatives is usually for the purpose of insuring sufficient numbers to withstand the effects of attrition and possible dismissal of a suit. Such activity by an attorney already retained to represent a formal party whose interests are potentially or actually the same as those of solicited class members hardly presents the dangers of stirring up litigation, assertion of fraudulent claims, misrepresentation,

undue influence, and overreaching potentially posed by solicitation of a prospective client to institute a lawsuit. Ohralik, 436 U.S. at 461. See Great Western Cities, Inc. v. Binstein, 476 F. Supp. at 835.

There is no justification for conditioning the right to engage in solicitation on the nature of the rights asserted in a class action or the motivation of legal counsel. Even those who favor a communications bar do not distinguish between types of litigation in terms of the frequency of potential abuses of the class action device. Moreover, the line drawn between "commercial" and "civil rights" litigation is necessarily arbitrary to some extent, and a distinction based upon the motivation of legal counsel has become blurred by the increasing availability of court-ordered fee awards under 42 U.S.C. §1988. See Maine v.

Thiboutot, 48 U.S.L.W. 4859 (U.S. June 25, 1980) (No. 79-838), (42 U.S.C. §1983 encompasses violation of any federal statute and availability of attorneys' fees awards under 42 U.S.C. §1988 is not limited to civil rights actions).

The First Amendment freedoms of parties to class actions and their counsel are admittedly not absolute. However, any restrictions on such rights must satisfy strict constitutional standards. Whether analyzed as a prior or subsequent restraint on speech, the order entered in the case at bar fails to fulfill such requirements.

B. A BLANKET RESTRICTION ON ALL COMMUNICATIONS BETWEEN PARTIES, OR THEIR COUNSEL, AND CLASS MEMBERS VIOLATES ESTABLISHED CONSTITUTIONAL STANDARDS IN THE AREA OF FIRST AMENDMENT RIGHTS

1. The Non-Communication Order Is Not Justified By The Need To Protect A Compelling Countervailing Interest

The non-communication order entered in this case is a classic example of a prior restraint, "a predetermined judicial prohibition restraining specified expression...." Chicago Council of Lawyers v. Bauer, 522 F.2d at 248; see Nebraska Press Association v. Stuart, 427 U.S. 539, 556 (1976). As such, it bears a heavy presumption against its constitutional validity. Id. at 558; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The proponents of a prior restraint must demonstrate that the expression sought to be restrained "surely [will] result in direct, immediate and irreparable damage" to a compelling public or private interest, New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J. concurring), or that it presents a clear and present

danger to an asserted interest. Thomas v. Collins, 323 U.S. 516, 530 (1945).

While the fair and proper administration of justice may justify some restraints on speech, "it does not authorize any blanket exception to the First Amendment." Rodgers v. United States Steel Corporation, 508 F.2d 152, 162 (3d Cir.), cert. denied, 423 U.S. 832 (1975) (citing Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941)). Free speech rights "should not be impaired...unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." Craig v. Harney, 331 U.S. at 373.

Even if rules or orders restricting communications concerning class actions

may not be characterized as prior restraints, Chicago Council of Lawyers v. Bauer, 522 F.2d at 248-49, they are still subject to exacting judicial scrutiny. Before a court can so limit fundamental rights, there must be a showing that the restraint on speech protects "a subordinating interest that is compelling." Bates v. Little Rock, 361, U.S. 516, 524 (1959).

In the case at bar, the Fifth Circuit noted that the district court entered the non-communication order in the absence of proof of the petitioners' unsworn charges of abuses by the respondents' attorneys and without making findings of fact. 619 F.2d at 464. It concluded that the court based its order on the recommendations of the Manual that district courts enact rules or enter orders limiting communications in actual or potential

class actions in order to protect against potential abuses of the class action device. 619 F.2d at 466.

The fact that abuses of the class action device have occurred in scattered cases or the remote possibility that the attorneys or parties in this action might commit some unknown abuse in the future does not establish a threat to the fair administration of justice sufficient to justify the entry of a wide-ranging communications ban. Moreover, many of the so-called abuses mentioned in the Manual in support of a communications bar, e.g., seeking a declaratory judgment as to the liability of one defendant, seeking to withdraw class allegations in an effort to effectuate an individual settlement, and negotiating a settlement with a second set of attorneys after the

first set had declined the offer, would not be prevented by a non-communication order. It is questionable whether other potential abuses mentioned in the Manual, e.g., solicitation of additional plaintiffs in class actions already filed, are actually abuses at all. See Zarate v. Younglove, 86 F.R.D., 80, 98 (C.D. Ca. 1980).

Thus, it is unclear what interests the order is intended to protect, how the prohibited communications threaten any legitimate interest, or whether the order is a reasonable means of protecting a countervailing interest. Restriction of First Amendment rights cannot be bottomed on such uncertainty, especially in light of the Manual's recognition that "generally, the experience of the courts in class actions has been favorable.... [A]buses

are the exception in class action litigation rather than the rule." Id. at 36-37.

2. The Restriction On All Communications With Class Members Is Impermissibly Overbroad

The First Amendment requires that restrictions on speech and associational activities be drawn carefully to avoid needless inhibition of constitutional rights. "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential tc the protection of the particular government interest involved." Procunier v. Martinez, 416 U.S. 396, 413 (1974). A legitimate and substantial government interest may not be protected "by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved. The breadth of legislative abridgement must be viewed in light

of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). See Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

The order here, like its counterparts in the Manual, suffers from overbreadth. The prohibition against all communications, direct or indirect, undoubtedly restricts protected speech and associational activities that pose no conceivable threat to the fair administration of justice or any other legitimate interest. In fact, it encompasses communications that actually would facilitate the fair and effective functioning of the judicial system. Only a narrowly-tailored order limiting only those communications which constitute specific abuses of the class action

device can satisfy constitutional standards.[5] Limitations on freedom of speech and association must not go beyond what is necessary to protect an established countervailing interest. Talley v. California, 362 U.S. 60, 64-65 (1960).

3. The Non-Communication Order Is Unconstitutionally Vague

Restrictions on fundamental liberties must satisfy constitutional standards

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[5] The special treatment of constitutionally protected speech in the order, and in the most recent version of the rule proposed in the Manual, does not cure its overbreadth. An attorney or party who communicates with class members in the belief that such communications are constitutionally protected may, nonetheless, be called upon to establish the basis for his belief, thus risking a possible contempt citation. The chilling effect on the exercise of First Amendment rights is surely as great as an outright prohibition of all speech.

of specificity. Specificity is especially critical where, as here, rights of free speech and association are involved.

> [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (footnotes omitted). A restriction on speech "so vague and indefinite in form...as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment." Winters v. New York, 333 U.S. 507, 509 (1948).

The order entered here, like its model in the Manual, is replete with

vague terms offering no guidance to attorneys, parties, or judges as to what behavior is permitted and what is prohibited. For example, the "indirect" communication prohibited by the order is susceptible of no limiting definition. Under this language, respondents or their attorneys risk violating the order if they respond to a reporter's questions concerning the class action, because they thereby may be communicating "indirectly" with class members. The ban on all communications certainly would encompass requests for information from class members. A lawyer therefore, risks punishment if he seeks information relevant to his client's case from persons with knowledge of the facts because they may be potential class members. As a result he may not satisfy his obligation to his client to investigate the facts fully.

Even the specific, but non-inclusive, prohibitions of the order are subject to widely varying interpretations. The line between prohibited "solicitation" and the mere transmission of information is difficult to draw, and the two messages are often part and parcel of the same communication.[6] The order offers no guidelines

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[6] This Court recently reiterated its view that solicitation is often inextricably entwined with First Amendment activity:

> Solicitating financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for the reality that without solicitation the flow of information would likely cease.

Schaumburg v. Citizens for a Better Environment, 444 U.S. at 632.

for distinction. The prohibition on communications that tend to misrepresent the action or reflect adversely on the court, the parties, or their counsel likewise provide no indication of what is prohibited and what is permitted. Such vagueness forces parties and their attorneys to refrain from speaking at all in order to protect themselves against possible remote effects on their comments. See Chicago Council of Lawyers v. Bauer, 522 F.2d at 259 (prohibition against public comment on matter that is "reasonably likely to interfere with a fair trial" is unconstitutionally vague).

The order entered in this case, as well as the proposed rule and order after which it is modelled, do not comport with constitutional standards where restriction of First Amendment

freedoms is involved. Specific remedies and sanctions for specific abuses, such as discipline of attorneys who exceed ethical limitations in communicating with class members, are available and satisfy constitutional requirements. Abuses of the class action device are a legitimate area of concern for the district courts. At the same time, no court can ignore speech and associational rights guaranteed by the First Amendment in attempting to deal with such abuses.

II

BROAD RESTRICTIONS, BY ORDER OR RULE, UPON COMMUNICATIONS BETWEEN PARTIES OR THEIR COUNSEL AND ACTUAL OR POTENTIAL CLASS MEMBERS EXCEED THE AUTHORITY OF THE DISTRICT COURTS

The authority of the district courts to prescribe rules and enter orders regarding class litigation is limited by Fed. R. Civ. P. 23(d) and 83 and by

28 U.S.C. §2071. Rule 23(d) states that the court may make "appropriate orders" in the conduct of class actions. Rule 83 permits the district courts to "make and amend rules governing [their] practice not inconsistent with" the Federal Rules of Civil Procedure, and in cases not provided for by rule, to "regulate their practice in any manner not inconsistent with these rules." Section 2071 allows them to prescribe rules which "shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Rules and orders affecting class litigation must, therefore, comport with the policies of Fed. R. Civ. P. 23, which governs the initiation and maintenance of class actions. Rodgers v. United States Steel Corporation; Zarate v. Younglove, 86 F.R.D. 80, 93-94

(C.D. Cal. 1980).

The objectives of Rule 23 include

> the efficient resolution of the claims and liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.

7 C. Wright and A. Miller, Federal Practice and Procedure §1754, p. 343 (1972) [hereinafter cited as "Wright and Miller"]. See also Hohmann v. Packard Instrument Company, 399 F.2d 711, 714-715 (7th Cir. 1968); Dubose v. Harris, 434 F. Supp. 227, 230 (D. Conn. 1977); Rutherford v. United States, 429 F. Supp. 506, 508 (W.D. Okla. 1977) (citing Wright and Miller); Contract Buyers League v. F&F Investment, 48 F.R.D. 7, 12-13 (N.D. Ill. 1969). This

Court recently summarized the purpose of class actions brought pursuant to Fed. R. Civ. P. 23(b)(3):

> The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 339 (1980).

In Califano v. Yamasaki, 442 U.S. 682, 701 (1979), it commented upon the desirability of class litigation in certain cases:

> [W]e note that class relief for claims such as those presented by respondents in this case is peculiarly appropriate. The issues involved are common to the class as a whole. They turn on questions

> of law applicable in the same manner to each member of the class....[E]ach individual claim has little monetary value. It is unlikely that differences in the factual background on each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

Rules and orders, such as those recommended in the Manual, the order entered in the case at bar, and former Rule 22 of the District Court for the Northern District of Illinois, which impose far-reaching restrictions on the ability of litigants and attorneys in actual or purported class actions to communicate with class members, conflict squarely with the policies embodied in Rule 23 and severely impede the proper conduct of class litigation. By limiting virtually all discussion concerning class

actions they deprive Rule 23 of much of its force. Such restrictions deny parties and their counsel access to crucial information relating to the number of potential claimants or defendants involved in a particular action, the size and similarity of their claims or defenses, and the appropriateness of a formal party as class representative. The proponents of a communications bar have themselves recognized that "[i]n many such cases class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process." Manual, p. 34.

The lack of such information makes it exceedingly difficult, if not impossible, for parties and their attorneys to make an informed decision as to the propriety

and feasibility of proceeding with litigation on a class basis. Restrictions on communication thus, hinder meaningful access to the courts by actual or potential members of a class, see Zarate v. Younglove, 86 F.R.D. at 97 (it is especially desirable to involve class members in Rule 23(b)(2) class actions because they do not have the right to opt out of the class), and discourage the resolution of disputes common to many in the class action form.

Restrictions on communication also interfere with the effective, fair and efficient functioning of the judicial system. The trial court's decision on the propriety of class certification depends largely on evidence provided by counsel for the formal parties. If counsel cannot freely obtain information concerning the size of a potential class, the nature of the claims involved, the interests of the

potential class members, and the adequacy of the class representation, such information will, most likely, never reach the court. The unavailability of information on the very factors which govern the outcome of the class certification issue may often lead the district court to an improper decision to certify a class or to deny class certification.

The hazards created by broad non-communication orders do not cease with class certification. Once a class is certified, restrictions on communication with class members present formidable obstacles to class representatives and their counsel in fulfilling their obligations to members of the class and in effectively conducting litigation. Such restrictions interfere with their duty to "fairly and adequately protect the interests

of the class" as required by Fed. R. Civ. P. 23(a)(4). A communications bar disrupts the development of litigation strategy, discovery, and trial preparation for plaintiffs and defendants alike, and inhibits the flow of information to class members on matters affecting their interests. Moreover, unless a sufficient number of class representatives can be obtained through free communication with class members, the inevitable effects of attrition, particularly in long, complex cases, may result in dismissal of a meritorious suit.

The fact that communications are subjected to the prior approval of the district court rather than absolutely prohibited does not mitigate the deleterious effects on the commencement and maintenance of class actions. A requirement that all

proposed communications be submitted to the court and opposing counsel may deter counsel for class representatives from making necessary contacts with class members in light of the duty to maintain the confidentiality of attorney-client communications. Furthermore, obtaining prior court approval of every proposed communication is not feasible when such communications may necessarily be on an ongoing basis. A rule or order that requires prior court approval of all communications with class members will, in a practical sense, stop such contacts almost as effectively as an absolute prohibition on communications.

In a frequently-cited, comprehensive, and thoughtful article entitled Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318 (1976), the authors have summarized

the serious problems that orders such as the one involved here pose for the effective maintenance of class actions:

> The present practice in some federal courts of prohibiting communications with the class by both the class attorney and the class opponent in the absence of prior court approval, although responsive to concerns of abuse, seems overbroad and potentially dysfunctional. Class attorneys and class opponents may limit their communications with a class in order to avoid the time consuming process of obtaining prior judicial clearance and limit the risk of antagonizing the judge. As a result, class attorneys may be handicapped in their efforts to obtain a picture of the different situations of class members, information-gathering and necessary business communications by class opponents may be impaired, class members may be denied legal advice, and the court itself may be deprived of information potentially relevant to its litigation decision.

Id. at 1600-01.

The district courts are not absolutely without power to monitor communications

in the class action context. However, in order to avoid conflict with the important policies of Rule 23, any restriction on communications concerning actual or potential class litigation must be based upon "a specific record showing by the moving party of the particular abuses by which it is threatened," and must be formulated to afford "the narrowest possible relief which would protect the respective parties." Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), cert. denied sub nom., Blue Cross v. Marsh, 434 U.S. 985 (1977). This standard is not met where, as here, a non-communication order is based solely on theoretical abuses or the occurrence of activities which encourage participation in the litigation of common claims and provide potential class members with information concerning the nature of a suit commenced on their behalf. Id.

Rules which generally constrain communications between formal parties or their counsel and class members in every potential and actual class action are necessarily made in the absence of any specific showing of actual or imminent abuse of the class action device. Hence, they too must fall when viewed in the light of the important objectives served by Rule 23. Rodgers v. United States Steel Corporation, 508 F.2d at 163-164.

CONCLUSION

For the foregoing reasons, amicus curiae the Chicago Council of Lawyers respectfully urges that the decision

of the Court of Appeals below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing Brief of the Chicago Council of Lawyers as Amicus Curiae in Support of Respondents have been served this 2nd day of March, 1981, by United States Mail, postage prepaid, upon the following counsel of records:

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No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,

Petitioners,

v.

WESLEY P. BERNARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* HUDSON PULP & PAPER CORP. IN SUPPORT OF PETITIONERS

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OTHER AUTHORITIES:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-441

GULF OIL COMPANY, ET AL.,

Petitioners,

v.

WESLEY P. BERNARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF OF *AMICUS CURIAE* HUDSON PULP & PAPER CORP. IN SUPPORT OF PETITIONERS

Hudson Pulp & Paper Corp., with the written consent of all parties, submits this brief as *amicus curiae* in support of reversal of the decision of the Court of Appeals below.

INTEREST OF THE *AMICUS CURIAE*

Hudson Pulp & Paper Corp. ("Hudson") is a Maine corporation, with its principal operating plant in the State of Florida. Hudson is a wholly-owned sub-

sidiary of Georgia-Pacific Corporation, a Georgia corporation doing business in many regions of the United States.

Hudson is engaged in the business of processing, producing and selling pulp and paper products. Its primary operational plant is located in Palatka, Florida. At that plant, it employs over 1,500 persons, including substantial numbers of minority and female employees.

Like many employers nationwide, Hudson has been the subject of occasional charges of race and/or sex discrimination based on Title VII of the Civil Rights Act, 42 U.S.C. §2000e, *et seq.* This has occurred notwithstanding Hudson's longstanding and continuous efforts to assure that its employment practices are in full compliance with all federal and state legal requirements.

Hudson's particular interest in the issue now before the Court arises from two suits filed against it in 1976 and 1977 and the subsequent history of those cases. These were both would-be class action suits brought under Title VII and certain other federal civil rights legislation. The first, *Gilley, et al.* v. *Hudson Pulp & Paper Corp.*, No. 76-444-Civ-JB (M.D. Fla., filed 1976), alleged discrimination on the basis of race. The second, *Taylor, et al.* v. *Hudson Pulp & Paper Corp.*, No. 77-464-Civ-WC (M.D. Fla., filed 1977), alleged discrimination on the basis of sex.

Without burdening this Court with details of those cases, Hudson would point out that both illustrate the critical need for judicial supervision of would-be class actions which is the fundamental issue in this case. After four to five years of litigation, compliance with the class action requirements of Rule 23, Fed. R.Civ.P. has not been established in either case. In the *Gilley* case, the plaintiffs have repeatedly altered and expanded the class

they purport to represent. In both cases, the plaintiffs have also repeatedly changed the teams of attorneys representing them. Under these circumstances (as shown more fully below), the need for judicial supervision as a check against possible miscarriage of the class action device has been apparent. Accordingly, Hudson has a genuine and practical interest in the ability of district court judges to effectively monitor class action proceedings free of unreasonable restrictions on their judicial discretion. Given the very great volume of Title VII class actions pending in the federal courts, Hudson suggests that the issues addressed in this case are also of concern to a wide spectrum of participants in such actions.

A particular episode of the class certification proceedings in the *Gilley* case aptly illustrates both the basis of Hudson's interest in this case and, more importantly, an example of the broad practical implications for the judicial process raised by the Fifth Circuit decision here under review.

After what was then four years of litigation, and after the plaintiffs had discharged two prior sets of attorneys, an evidentiary hearing on the issue of whether a class action should be certified was convened. Significantly, however, while still represented by their second set of attorneys, a stipulation for compromise and dismissal of the action had been filed with the Court the previous year.[1] Thus, the evidentiary hearing in question addressed the issues of class certification, the

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[1] The issue of whether the plaintiffs had validly authorized their prior attorneys to settle the case is still being contested in the *Gilley* case.

scope of the class (if any) to be certified[2] and the question of whether a valid settlement had been entered.

After two days of hearings, in which plaintiffs called numerous non-party witnesses to testify as potential class members, the Court saw that the hearing was going to be quite long, and found it necessary to adjourn the hearing for approximately 50 days due to the Court's crowded trial calendar. However, during the two days of hearings the Court had determined that "the ultimate question of [class] certification may well depend upon the credibility of the witnesses." (*Gilley, supra,* Order of July 29, 1980).

Therefore, in order to preserve the integrity of the ongoing class certification hearing, the Court issued an interim order which, *inter alia*, limited communications by attorneys with potential members of the uncertified class (excepting past or prospective witnesses) during the adjournment of the hearing. Subsequently, plaintiffs filed a motion asking the Court to clarify and modify this interim order. The Court then issued an Order of Clarification which clarified some of the restrictions of the initial order, but preserved the prohibition on communication between counsel and non-party members of the uncertified class until completion of the class certification hearing. As the trial court stated in its order

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[2] The plaintiffs had purported to amend their motion for certification to encompass a class of all black employees (past, present and future) at Hudson's plant, whereas their original motion had been limited to only two departments of some 14 departments at the plant. Therefore, at the time of the hearing, the scope of even the potential class the plaintiffs were seeking to represent was riddled with uncertainty.

(*Gilley, supra,* Order of Clarification of August 29, 1980, at 3):

> The prohibition on communication between counsel and members of the proposed class, except those who are past or prospective witnesses, until the present hearing on class certification is completed, is necessitated by the specific findings of particular and potential abuses in this case made in the July 29, 1980 Order. The prohibition is made pursuant to the guidelines found in *Bernard* v. *Gulf Oil Company,* 619 F.2d 459 (5th Cir. 1980), to avoid direct and irreparable damage to the resolution of the class certification issue.

Assuming (mistakenly, as it turned out) that the *Bernard* opinion did not deprive a trial court of its indispensable power to preserve the integrity of proceedings *sub judice,* the district court felt compelled under the circumstances to impose interim restrictions on certain communications to last only during the evidentiary hearing on class certification.

The plaintiffs then filed a petition for a writ of mandamus with the Fifth Circuit, seeking to have the district court's order countermanded. The Fifth Circuit, tersely citing the *Bernard* decision, rapidly issued a one-sentence writ of mandamus vacating the district court's order insofar as it limited attorney communications with potential class members.[3] *In Re Edward Gilley, et al,* No. 80-5677 (5th Cir., Sept. 11, 1980). Giving short shrift to the district court's findings and concerns regarding particular and potential abuses, the appellate court effective-

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[3] Significantly, the writ was issued on an "emergency" basis, without directing the court or the defendants to answer the petition in accordance with the normal procedures of Rule 21(b), Fed. R. App. P.

ly authorized plaintiffs' attorneys to communicate at will with members of the uncertified class.

Hudson calls this episode to the Court's attention to point out that the ramifications of the *Bernard* decision now under review are broad indeed, and entail very substantial restrictions on the ability of district courts to respond to the peculiar problems arising in class actions. Even though the trial court's order limiting communications during the hearing recess was based on "specific findings of particular and potential abuses", the Fifth Circuit deemed this insufficient to comply with *Bernard's* standards.

District Court's charged with the duty of preserving the fairness and integrity of ongoing class certification proceedings under Rule 23(d), Fed. R. Civ. P., should not be unrealistically hamstrung in discharging those duties. The trial court has firsthand, on-the-spot familiarity with the particular problems that arise in this regard; adoption of the unrealistic standards set forth in *Bernard* will deprive trial courts of the practical ability to respond to serious threats of abuse to class action procedures and to maintain judicial control over proceedings before them.

For the reasons set forth below, Hudson submits that this Court should reverse the Fifth Circuit's *Bernard* decision insofar as it invalidates the district court order below limiting communication with potential class members.

SUMMARY OF ARGUMENT

I

The adversary system of justice is a delicate mechanism, requiring vigilant supervision by judges to preserve its orderly and efficient functioning. Accordingly, judges are necessarily vested with substantial power and discretion to supervise the conduct of parties, attorneys and other participants in the judicial process. The compelling needs of the administration of justice sometimes entail limitations on the communicative activity of the participants insofar as it impacts upon the judicial proceedings. These considerations obtain with special force in class action litigation, where district judges are specifically charged with the power and the duty to take measures to safeguard against potential abuses which are peculiar to such proceedings. In setting aside the district court order involved in this case, the Fifth Circuit would invalidate measures which have been widely recognized as appropriate in dealing with the unique problems of the class action device.

II

The Fifth Circuit applied a form of "prior restraint" analysis which is inapposite to the problems faced by district court judges in dealing with communicative abuses which are peculiar to the class action device. Judges require a reasonable degree of flexibility and discretion to forestall such abuses *before* potential class members may be subjected to misleading or confusing overtures. Under the standard imposed by the Fifth Circuit, the court would be required to withhold effective judicial supervision until an "emergency" was apparent. Since the class action device is inherently vulnerable to such abuses as improper solicitation and

undue influence, courts should be authorized to enter orders allowing them to monitor communications with potential class members without waiting for the signs of abuse to surface. Certainly where the court perceives a reasonable likelihood that abuse will occur it should have the discretion to enter such orders.

ARGUMENT

I. Trial Courts Require Substantial Discretion To Deal With Actual And Potential Abuses Of The Class Action Device As They Arise.

The adversary system of justice is a delicate mechanism. Absent the discipline and supervision imposed by presiding judges, the natural efforts of litigants to vindicate their particular claims or causes would often veer out of control, leading to confusion or even chaos in the proceedings.

Accordingly, our jurisprudence has long recognized the fundamental need for trial courts to be vested with sufficient power and discretion to preserve the integrity, fairness and order of the adversary system of justice. *See, e.g., Gannett Co., Inc.* v. *De Pasquale,* 443 U.S. 368 (1979); *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966); *Pennekamp* v. *Florida,* 328 U.S. 331, 347 (1946); *Farr* v. *Pitchess,* 522 F.2d 464 (9th Cir. 1975), *cert. cenied,* 427 U.S. 912 (1976). As one district court recently observed, "The inherent power of the court to protect the administration of justice is undisputed." *Zarate* v. *Younglove,* 86 F.R.D. 80, 101 (C.D. Calif. 1980).

In some instances (e.g., criminal pretrial suppression hearings), this Court has recognized that the exigencies of judicial proceedings are such that "a trial judge may surely take protective measures even when they are not

strictly and inescapably necessary." *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 378. Such observations merely recognize the basic and compelling need for trial judges to have sufficient discretion to deal pragmatically with situations where they perceive a genuine threat to the fair and orderly conduct of judicial proceedings before them.

Even when First Amendment concerns may be implicated, the trial court does not abdicate its responsibility to safeguard the integrity and efficiency of judicial proceedings. To be sure, this case does not involve the classic tension between uninhibited debate on public issues and conflicting governmental restrictions. The communicative activity in question here is solely incidental to the activity of parties before the court in the conduct of litigation, and impacts directly on the judicial proceedings. Nonetheless, precedents recognizing the power of the courts to limit more pristine First Amendment activity in the interests of justice are instructive.

In *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966), for instance, this Court recognized that communicative activity must sometimes accommodate the imperatives of the fair administration of justice where the communications in question may impact adversely on the rights of parties. The Court also emphasized that trial courts must be prepared to take steps to regulate communicative activity threatening the judicial process *before* it happens, not after the harm is already accomplished (*id.*):

> But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will portect their processes from prejudicial

> outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

In *United States* v. *Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969), the Court upheld a trial court's order forbidding extrajudicial statements by the defendants concerning a pending criminal case against First Amendment challenge. As the Court observed there:

> The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, "the most fundamental of all freedoms."

Similarly, the courts have upheld prohibitions on picketing in areas surrounding courthouses, *Cox* v. *Louisiana*, 377 U.S. 536 (1965); and the exclusion of the press from pretrial proceedings, *Gannet Co.* v. *DePasquale*, 443 U.S. 370 (1979).

The common thrust of such precedents was aptly summarized by the court in *Waldo* v. *Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790 (E.D.La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978), (upholding a local rule limiting communication with potential class members) as follows:

> It is well settled that the courts may reasonably protect the integrity of their proceedings by limiting activities normally protected by the First Amendent.

In would-be class actions in particular, the trial court must exercise considerable power and discretion to protect the interests of absent potential class members, as well as the integrity of the class action device itself. *See, e.g., Deposit Guaranty National Bank* v. *Roper*, 48

U.S.L.W. 4279 (1980); *Carlisle III* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237, 240 (N.D. Tex. 1972); *Waldo* v. *Lakeshore Estates, Inc.*, *supra*; *Stavrides* v. *Mellon Nat'l Bank and Trust Co.*, 60 F.R.D. 634, 637 n. 6 (W.D. Pa. 1973). Would-be class actions involving attempts to represent large "across-the-board" classes carry the potential for improper solicitation, misrepresentation of the nature and status of the litigation, and conflicts of interest among subclasses with antagonistic objectives.[4] As one district court observed in considering the need for reasonable curbs on unfettered communication by attorneys in the class action context, *Waldo* v. *Lakeshore Estates, Inc.*, *supra*, 433 F. Supp. at 790:

> It is one we find all the more compelling in the class action framework, given the heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to "drum up" participation in the proceeding. Moreover, it is likely that uninvited and unapproved communications to this effect "may appear [to the party solicited] to be an authorized activity approved by the court, simply by reference to the title of the court, the style of the action, the name of the judge, and to official processes."

A related source of potential abuse inhering in the large class action is the "mass meeting" conducted by counsel for the putative class. Absent local rules or court

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[4] *See, e.g., Strong* v. *Arkansas Blue Cross and Blue Shield, Inc.*, 87 F.R.D. 496 (E.D. Ark. 1980). Effective judicial monitoring of communications with potential class members is one means of guarding against the problem of overinclusive representation and accompanying intra-class conflicts.

orders such as that in issue here, such meetings present the opportunity for a multitude of abuses which have been recognized by the courts. As observed by the court in *N.O.W.* v. *Minnesota Mining & Mfg. Co.*, 18 FEP Cases (BNA) 1176, 1179 (D. Minn. 1977):

> It is the considered opinion of the court that any attempt to conduct and manage such litigation in the context of mass meetings conducted by attorneys for the parties for the purpose of discussing the status of the litigation would end in chaos. There would be no way to avoid the dissemination of misinformation and to preserve the integrity of the class action procedure. In order to avoid the potential for abuse in the cases now before the court, the court deems it appropriate to require that all communications to large numbers of class members be made in writing and with the prior approval of the court.

Similar concerns moved the district court to hold as follows in *Waldo* v. *Lakeshore Estates, Inc.*, *supra*, 433 F. Supp. at 794:

> However, we categorically oppose the notion that a policy allowing unfettered communication to encourage participation in a class suit is consistent with the purpose of Federal Rule 23. The potential abuses attendant upon such unregulated communication clearly undermine the efficacy of the class action device.

The various court decisions[5] which have approved necessary restrictions on communication with potential

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[5] *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972); *Waldo* v. *Lakeshore Estates, Inc., supra; N.O.W.* v. *Minnesota Mining & Manufacturing Co., supra; cf. Oswald* v. *McGarr*, 620 F.2d 1191, 1195 (7th Cir. 1980) (refusal to issue writ of mandamus despite claim that

class members of the kind at issue here are of course not the only source of authority running contrary to the Fifth Circuit's *Bernard* decision. The model order of the *Manual for Complex Litigation* (1 Pt. 2, Moores Federal Practice, Pt. II, §1.41 (1979)) and the numerous local rules closely patterned after it reflect the combined legal wisdom of an imposing aggregate of judges, legal scholars, and knowledgeable practicing lawyers. The core conclusion of all this persuasive authority is that, given the *inherent* danger of communicative abuse in the class action context, district courts must have a substantial measure of authority and discretion to exercise close and effective supervision over communications with potential class members by counsel and parties. Indeed, these authorities recognize that the potential for abuse is so basic that judges should be authorized to enter reasonable monitoring orders of the kind in issue here as a precautionary measure without the obligation to engage in painstaking, case-by-case analysis.

In contrast, the holding in *Bernard* imposes an improvident rule of law which effectively deprives the trial court of the means to effectively monitor abuse of the class action device.

II. Court Orders Such As That In Issue Here Are Necessary To Fulfill The Objectives Of Fed R. Civ. P. 23(d) And Are Not Unconstitutional.

The fundamental error of the Fifth Circuit's *Bernard* decision is that it misapplies traditional "prior restraint" analysis to circumstances where such analysis

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district court's refusal to allow counsel to send a separate communication to subclass members detailing counsel's objections to a settlement offer violated First Amendment).

is inapposite. The result is to impose on district judges an unrealistic and impractical constraint on their discretion to monitor and supervise otherwise unwieldy class actions, under Rule 23(d), Fed.R.Civ. P.

As noted above, there are a wide variety of circumstances where the practical exigencies of the judicial process necessarily entail restrictions on unfettered communication by participants in that process. For instance, no one would deny the Court's power to sequester witnesses from talking to each other or to attorneys during the course of an ongoing hearing. As this Court noted in *Geders* v. *United States*, 425 U.S. 89, 87 (1975):

> The Judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.

Sequestration is of course an extreme restraint on the freedom to communicate, yet few would question the court's power to sequester as a necessary aspect of the judicial process. Such measures are routinely and properly treated as matters of judicial procedure rather than as First Amendment questions. The element of "speech" involved is subject to supervision only insofar as it is implicated in the judicial proceedings before the court.

In that respect, court orders and rules designed to monitor communication with potential class members concerning the case are but a logical extension of the court's power (and duty) to preserve the integrity and fairness of judicial proceedings. In the case at bar, the impetus for the order was the court's concern that unmonitored communications by counsel might tend to misrepresent the status, purposes or effects of the class action to potential class members. The interim order

entered by the district court in the *Gilley* case involving the *amicus* (discussed *supra*) stemmed from that court's concern to preserve the integrity and spontaneity of testimony in an ongoing evidentiary hearing on class certification. In both circumstances, the judge was simply taking measures deemed necessary to deal with concrete incidents which threatened the fair and orderly conduct of proceedings under the court's jurisdiction. The trial court's first hand familiarity with the particular facts and incidents involved in such circumstances give it a unique perspective to balance the conpeting interests at stake.

The Fifth Circuit's *Bernard* decision effectively deprives trial courts of the necessary discretion to deal with the well-catalogued abuses of the class action device. The court employed a form of prior restraint analysis which is unexceptionable when applied to cases where pristine First Amendment values are at stake, e.g., *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931); but which is inapposite and unduly mechanistic when the issue is only incidentally one of speech but essentially one of judicial procedure. *Compare*: *United States* v. *Tijerina*, *supra*, 412 F.2d at 666 ("[T]he Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about a trial").

To effectively incorporate the "clear and present danger" test into Rule 23(d) of the Federal Rules of Civil Procedure would be to shackle the district court's ability to manage and monitor class action litigation to an unprecedented degree. The widespread adoption of local court rules and orders patterned after the Model Order from the *Manual for Complex Litigation* reflects a substantial judicial consensus that a presumption of

unconstitutionality does *not* attach to orders of the kind in issue here.

Significantly, the order in question here reserves the attorneys' right to proceed with communications they deem constitutionally protected. It is therefore a monitoring order rather than a restraining order. Accordingly, it does not fall within the category of orders which deprive the speaker of the right to assert unconstitutionality as a defense in ensuing contempt proceedings. The attorney's good-faith conviction of his constitutional right to communicate under the order would be a valid defense. As specifically held by the court in *Waldo* v. *Lakeshore Estates, Inc.*, *supra*, 433 F. Supp. at 789, restrictions including such an escape clause simply do not trigger "prior restraint" analysis.

The Fifth Circuit's own analysis in this case reveals the extremity of its consequences. The Court clearly indicated that "Only an *emergency*" can justify restrictions upon the attorneys' unfettered right to communicate with the actual or potential class members. 619 F.2d at 474 (emphasis added; quoting *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Indeed, the Fifth Circuit even acknowledged that one respectable school of thought holds that under prior restraint analysis, "everything, or virtually everything, is entitled to be published at least once." *Id.*

Thus, the logical consequence of the Fifth Circuit's *Bernard* holding would be to require class action trial courts to wait until an *emergency* arose before taking measures to supervise what amount to inherently abuse-prone communications between attorneys and potential class members. But by the time an emergency is apparent to the Court, the disruptive seeds would already

be sown or the potential class members would already be infected by confusion concerning the case. It is evident, therefore, that the standards enshrined by the Fifth Circuit in *Bernard* would place trial courts at the mercy of events in class actions, and generate recurring conflict with their responsibilities under Rule 23(d) to supervise the progress of the action. In this respect, the *Bernard* holding runs directly contrary to what this Court emphasized in *Sheppard* v. *Maxwell, supra*, 384 U.S. at 363, respecting prompt and effective court action to deal with communications disrupting judicial processes: "[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."

Accordingly, the precautionary approach embodied in the recommendations of the *Manual for Complex Litigation* (and in the local rules patterned after it) represents a sound policy for dealing with the inherently sensitive problem of attorney communications with potential members of an uncertified class. Following the *Manual's* recommendations, the district court could enter an order (such as that in issue here) allowing it to monitor such communications *before* any misuse of class action mechanisms occurred. Such a practice is especially appropriate and justified in light of the district court's authority and duty under Rule 23(d), Fed. R.Civ. P., to take necessary measures to protect absentee class members and otherwise assure "the fair conduct of the action."

Alternately, the *amicus* respectfully submits that the appropriate standard of review for orders designed to monitor communications with actual or potential class members should be similar to that used by the court in

United States v. *Tijerina, supra*, as applied to orders forbidding extrajudicial discussion of the merits of a pending criminal case. There, the court observed as follows (412 F.2d at 666):

> Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a "reasonable likelihood" of prejudicial news which would make more difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial.

Similarly, trial courts should be able to issue orders allowing them to supervise or limit communications with actual or potential class members at least when they perceive a "reasonable likelihood" that such communications will prejudice the fair and orderly conduct of the class action. Hudson submits that the facts shown in the record of this case are clearly sufficient to meet such a standard. Accordingly, the Fifth Circuit's decision under review should be reversed, inasmuch as it was based upon an unduly restrictive constraint on the ability of trial courts to respond effectively to the exigencies posed in class action litigation.

CONCLUSION

For the foregoing reasons, amicus curiae Hudson Pulp & Paper Corp. respectfully urges that the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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Dated: January 22, 1981

No. 80-441

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October Term, 1980

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF TALLAHASSEE MEMORIAL HOSPITAL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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General Telephone Co. v. EEOC, ... U.S. ....., 64 L.Ed.2d 319, ... S. Ct. ..... (1980) 16

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Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 13

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OTHER AUTHORITIES

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BRIEF OF TALLAHASSEE MEMORIAL HOSPITAL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

TALLAHASSEE MEMORIAL HOSPITAL, by and through its undersigned counsel, files this brief as amicus curiae in support of the Petitioners

STATEMENT OF INTEREST

Tallahassee Memorial Hospital (hereinafter "TMH") is the defendant in *Lilla Ann Norton, et al. v. Tallahassee Memorial Hospital,* TCA No. 76-163, currently pending before the United States District Court for the Northern District of Florida, Tallahassee Division. The *Norton* action was filed on September 22, 1976, as a Rule 23(b)(2) class action, seeking back pay, injunctive relief, costs and

attorney's fees under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

During most of the more than four year period that the *Norton* lawsuit has been pending before the district court, it has been governed by a local rule and various orders of the district court relating to communications between the parties, their attorneys, and actual or potential class members. Said local rule and orders of the district court have been similar to the class communications order entered by the district court in the case at bar.

Notwithstanding the local rule and orders of the district court governing class communications, counsel for the parties to the *Norton* action have effectively communicated with hundreds of the purported class members for the purpose of obtaining information and discovery relating to the lawsuit. Reports and other documents filed with the district court indicate that Norton's counsel have, since the filing of the lawsuit and the application of the local rule governing class communications thereto, communicated with many of the purported class members by letter and telephone, conducted a number of meetings with many of the purported class members, and "spent very substantial periods of time"—"an astronomical number of attorney hours"—personally interviewing and conferring with most of the purported class. Similarly, counsel for TMH have spent hundreds of hours during the last several years interviewing most of the purported class members in accordance with the district court's local rule and orders governing class communications. Class discovery has been completed, and the parties are awaiting a hearing on Norton's motion for class certification.

At no time since the filing of the *Norton* lawsuit and the application of the local rule governing class communications thereto has any allegation or evidence been pre-

sented to the district court to show that the parties or their attorneys have in any way been impeded or impaired in preparing their case for trial by the district court's local rule or orders governing class communications.

Because of the substantial amount of time, effort, and money which TMH has expended in communicating with purported class members in accordance with the district court's local rule and orders and otherwise preparing its case for trial, TMH has a direct and immediate interest in the integrity and legitimacy of the activities which have occurred to date in the *Norton* lawsuit and in the local rule and orders relating to class communications which have governed said activities.

SUMMARY OF ARGUMENT

In Part V of its *en banc* decision, the Fifth Circuit erroneously concluded that the communications at issue herein are constitutionally protected. The Fifth Circuit found no distinction between the communications proscribed by the district court's order in the instant case and the communications involved in two earlier decisions of this Court, *NAACP v. Button,* 371 U.S. 415 (1963), and *In re Primus,* 436 U.S. 412 (1978). At the same time, the Fifth Circuit found inapposite the constitutionally unprotected communications involved in this Court's decision in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978).

Neither *Button* nor *Primus* involved litigation brought under a statute which expressly authorizes an award of attorneys' fees to the prevailing party. Instead, both *Button* and *Primus* arose before Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

In contrast, the instant litigation includes claims for attorney's fees under both Title VII and 42 U.S.C. § 1988. Because the potential recovery of attorney's fees in a Title VII class action depends in part upon the size of the class for which relief is obtained, parties-plaintiff and their attorneys stand to benefit financially from communications with actual or potential class members. This prospect of financial gain to Title VII plaintiffs and their attorneys, and the availability of substantial back pay awards to prevailing Title VII class members, create the possibility that *any* communications between the parties or their attorneys and actual or potential class members may involve misrepresentation or overreaching. The possibility of misrepresentation is further increased in the Title VII area because class members often tend to be uneducated and unschooled in the technicalities of the law. In many cases, the only means of effectively communicating with such unlettered class members is in person, which further enhances the possibility of misrepresentation, overreaching, or undue influence. However laudatory, unselfish and public-interest oriented the motives of Plaintiffs' attorneys may be in the case at bar, the prospect of financial gain to the Plaintiffs and their attorneys and the related possibility of misrepresentation to absent class members take the communications at issue herein outside the protective scope of the First Amendment.

ARGUMENT

In Title VII Class Litigation Involving a Claim for Attorney's Fees, Communications Between Parties or Their Attorneys and Actual or Potential Class Members Do Not Enjoy Constitutional Protection.

In Part V of its *en banc* decision, the Fifth Circuit, citing this Court's earlier decisions in *NAACP v. Button, supra,* and *In re Primus, supra,* held that the communications proscribed by the district court's order are constitutionally protected. The Fifth Circuit based its holding on the fact that the subject matter of the communciations at issue is the same as the subject matter of the communications involved in *Button* and *Primus*—i.e., racial discrimination. Because the subject matter of the solicitation activities of Plaintiffs' attorneys in the case at bar related to the vindication of allegedly illegal racial discrimination, the Fifth Circuit found no difference between the class communication activities of Plaintiffs' attorneys in the instant case and the solicitation activities of the attorneys in *Button* and *Primus.*

Not all speech involving a particular subject matter enjoys the privileges and protection of the free speech provisions of the First Amendment. In fact, the question of constitutional protection does not turn, as the Fifth Circuit suggests, upon the subject matter of the communication, but instead depends upon the nature or form of the speech and the context in which it is made. As Justice Holmes noted in *Schenck v. United States,* 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre."

Similarly, neither the parties to pending litigation nor their attorneys enjoy unbridled constitutional protection

of all of their speech. Whether the speech of litigants or attorneys falls within the protective umbrella of the First Amendment depends, once again, upon the form or nature of the speech and the context in which it is presented.

With respect to the speech of attorneys, champerty, barratry, and maintenance were recognized offenses under the common law long before the passage of the Bill of Rights. Winfield, *The History of Conspiracy and Abuse of Legal Procedure,* 152 (1921). The common law offense of champerty involved an attorney's soliciting or maintaining a lawsuit in return for a financial interest in the outcome. 4 W. Blackstone, *Commentaries* 134-136. Barratry and maintenance similarly involved actions motivated by the prospect of personal pecuniary gain. *Id.*

There is nothing in the recorded history of the Bill of Rights to indicate that either its authors or the state legislatures which adopted it intended the free speech provisions contained therein to encroach upon or abolish the common law offenses of champerty, barratry, or maintenance. To the contrary, in *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), this Court recently reconfirmed that an attorney's solicitation of litigation for his own personal financial gain is not protected under the First Amendment.

Ohralik involved a classic case of "ambulance chasing." A member of the State Bar of Ohio visited a victim of an automobile accident to encourage the victim to retain his services. The underlying purpose of the visit, as found by the lower court, was the prospect of obtaining attorney's fees in connection with the solicited litigation.

This Court upheld the State Bar of Ohio's discipline of the attorney and held that the attorney's solicitation

activities were not protected under the First Amendment. Two specific holdings in *Ohralik* are particularly germane to the present case. First, whenever solicitation by an attorney is based upon the prospect of financial gain to the attorney, a presumption arises that the attorney's judgment will be clouded by greed while engaged in such solicitation. 436 U.S. at 461 n.19. Secondly, the circumstances under which the solicitation occurred in *Ohralik*—specifically, a personal visit by the attorney to the person solicited—further enhances the possibility of abuse arising out of the solicitation. Thus, while the possibility of attorney misconduct is always present,

> the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person.

436 U.S. at 465.

In several other cases, this Court has found pre-suit solicitation by attorneys for a non-profit public interest organization to be within the protective scope of the First Amendment where there was no prospect that the attorneys engaged in the solicitation stood to gain financially from their activities.

NAACP v. Button, 371 U.S. 415 (1963), involved solicitation activities of NAACP Legal Defense Fund attorneys in 1957 in connection with litigation to desegregate the Virginia public schools. The solicited litigation was brought under a civil rights statute which did not expressly authorize an award of attorney's fees to the prevailing party.[1] *Button* thus did not involve the prospect of personal fi-

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1. Such express statutory authorization of attorney's fees to the prevailing party in a civil rights case did not exist until Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended.

nancial gain to the soliciting attorneys. This Court, therefore, allowed the NAACP attorneys to solicit prospective litigants, inasmuch as "no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor." *Id.* at 443. While this Court held that the solicitation in *Button* was protected under the First Amendment, it also held that where solicitation is based upon the prospect of financial gain to the solicitor, such activity would not fall within the protective scope of the First Amendment.

In re Primus, 436 U.S. 412 (1978), also involved solicitation by an attorney associated with a non-profit public interest organization. In *Primus,* the ACLU made funds available in 1973 for litigation challenging the government's policy of requiring sterilization as a condition of receiving public medical assistance. As in *Button,* the solicitated litigation in *Primus* was brought under a civil rights statute which did not expressly authorize an award of attorney's fees to the prevailing party.[2] An attorney associated with the ACLU was disciplined by the state bar association for notifying a prospective litigant by mail that monetary assistance was available. The discipline was upheld by the South Carolina Supreme Court.

This Court reversed, holding the discipline improper. Noting that the ACLU attorney involved in the solicitation was not involved in the subsequent ACLU-sponsored litigation, this Court based it decision on the fact that there was no prospect or possibility that the soliciting attorney would gain financially from the solicitation. *Id.* at 442, 429-30 n.21, 430 n.24, 436 n.30. This Court also noted that the solicitation was conducted by letter, rather than in person, thereby further reducing the possibility of mis-

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2. See footnote 1, *supra.*

representation arising out of the solicitation. *Id.* at 435. While this Court held that the solicitation involved in *Primus* was thus entitled to some constitutional protection, it also held that the First Amendment did not prohibit the establishment of reasonable restrictions regarding the time, place, and manner of solicitation such as that involved in *Primus*. *Id.* at 438.

The only exception to the general rule that solicitation involving the prospect or possibility of financial gain to the solicitor may constitutionally be proscribed or prohibited is *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* involved an advertisement of attorney's fees for routine legal services such as uncontested divorces, uncontested personal bankruptcies, and name changes. While the solicitation clearly involved the prospect of financial gain to the attorneys engaged in the solicitation, this Court based its holding that such solicitation was entitled to some constitutional protection upon the nature of the services solicited (routine legal matters) and the context in which the solicitation was presented (a published advertisement). While this Court found that such solicitation was not likely to lead to misrepresentation, overreaching, or undue influence, it nonetheless held that the First Amendment did not prohibit the establishment of reasonable rules relating to the time, place, and manner of such solicitation. *Id.* at 383-384.

The *Bates* decision does not apply to the facts in the case at bar because of the fundamental difference between general advertising and special solicitation, as delineated by this Court in its *Ohralik* decision:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The

> aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Ear, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsel is good ones" is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the availability, nature, and prices of legal services; it actually may disserve the individual and societal interest, identified in Bates, in facilitating informed and reliable decision-making.

436 U.S. at 457-58 (citations and footnotes omitted).

In short, this Court will not allow repression of professional advertisement presented in a general fashion. It is when the lawyer baits his hook with special knowledge of facts and with personal contact, personally encouraging a party to join in litigation which will financially benefit the attorney, that the First Amendment guarantee disappears. Furthermore, the *Bates* decision was limited to advertisement of routine legal services. The practice involved in a complex class action suit is far from "routine."

In *Primus, supra,* this Court noted that the line between constitutionally unprotected *Ohralik*-type solicitation and constitutionally protected *Button* and *Primus*-type solicitation, "based in part on the motive of the speaker [private pecuniary gain or public interest] and the character of the expressive activity [in person or otherwise likely to result in misrepresentation, overreaching, or undue influence] will not always be easy to draw." 436 U.S. at 438 n.32. Clearly, the stated motive of the solicitor cannot be the determining factor, inasmuch as any

attorney worth his salt can show that there are some non-pecuniary, public interests underlying his solicitation activities.

A better test is to look to the statute under which the solicited litigation is brought. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court ruled that attorney's fees are not recoverable in public interest litigation, absent express statutory authorization for such an award. As a result of *Alyeska*, a federal court can now look to the statute under which the solicited litigation is brought as one indicator of whether solicitation is based upon the prospect of financial gain to the solicitor (through an award of statutorily-authorized attorney's fees) or is instead based upon public interest with no prospect of financial gain (because the statute does not expressly authorize an award of attorney's fees).

Congress has expressly authorized an award of attorney's fees to the prevailing party in a Title VII action, 42 U.S.C. § 2000e-5(g), and has also recently authorized an award of attorney's fees to the prevailing party in other civil rights litigation.[3] Attorney's fees may be awarded under Title VII even if a party prevails on only some of his claims, *Bolton v. Murray Envelope Corp.*, 553 F.2d 881, 884 (5th Cir. 1977), and the amount of back pay and attorney's fees which may be awarded in class litigation under Title VII can be substantial. *See, e.g., Harkless v. Sweeny Independent School District*, 608 F.2d 594 (5th Cir. 1979) ($294,562.00 in attorney's fees). Moreover, neither Congress nor the courts distinguish between attorneys employed by or associated with public interest law firms and private attorneys with regard to entitlement to or computation of attorney's fees for the prevailing party under Title VII. *New York Gaslight Club, Inc. v. Carey*,

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3. **See footnote 1, *supra*.**

..... U.S. ....., 64 L.Ed.2d 723, 738 n.9, ... S. Ct. ..... (1980); *Copeland v. Marshall*, ... F.2d ....., 23 FEP Cases 967, 980-981 (D.C. Cir. 1980). Attorneys representing the prevailing party in a Title VII case are entitled to receive fees based upon the fair market value of their services, whether they work for a public interest law firm or themselves. *Id.* Title VII law regarding the availability and recovery of attorney's fees by an attorney employed by or associated with a public interest law firm is thus very different from the prospect of financial gain to public interest lawyers at the time this Court decided *NAACP v. Button, supra* (when the per diem payment to an NAACP lawyer was "smaller than the compensation ordinarily received for equivalent private professional work," 371 U.S. at 420-421).

The Fifth Circuit discounted the prospect of financial gain to Plaintiffs' attorneys in the case at bar because of affidavits submitted by several of Plaintiffs' attorneys attesting to the fact that they neither received nor expected to receive any compensation for their services "from class members."[4] However, this ignores the fact that in most Title VII class actions where fees have been awarded to

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4. Unfortunately, the record does not show why one of Plaintiffs' attorneys, Stella Morrison, nevertheless obtained retainer agreements from thirty-four of the purported class members. The record is also unclear as to what portion of the potential attorney's fee award would go in which Plaintiff's attorney's pockets. Mr. Goldstein's affidavit states that any court-awarded attorney's fees would not be paid directly to himself or to any other attorney "*at* the Legal Defense Fund" [emphasis added] (presumably referring to Mr. Goldstein, Mr. Greenberg, and Mr. Patterson—the only Plaintiffs' attorneys employed by and at the Legal Defense Fund). Mr. Goldstein does not state whether any court-awarded attorney's fees would be paid to him and the other Legal Defense Fund attorneys indirectly through raises in salary or bonuses. While the record is even more unclear as to what portion of any potential attorney's fee award Bernard's three local attorneys, Thibodeaux, Cotton, and Morrison, who attended the May 22, 1976 meeting, intend to receive, it is reasonable to assume that they expect or hope to receive some compensation for their efforts in this action, should the Plaintiffs and the class prevail.

attorneys associated with or employed by a public interest law firm, the attorneys have recovered said fees directly from the defendant employer, rather than indirectly from the prevailing class members. For example, in *Harkless v. Sweeny Independent School District, supra,* the defendant was ordered to pay $256,000 in attorney's fees directly to the attorneys associated with the Legal Defense Fund.

The Fifth Circuit also ignored the fact that the amount of attorney's fees available to the Plaintiffs and their attorneys, should they prevail in their Title VII action, would be affected by the number of class members for whom relief is obtained as well as the amount of back pay and other relief obtained for said class members. In one of the landmark decisions regarding the computation of attorney's fees under Title VII, *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), the Fifth Circuit held that one of the factors which must be considered by a district court in awarding attorney's fees to prevailing class action plaintiffs and their attorneys in a Title VII case is the size of the class and the amount of back pay and other relief awarded to the class. "If the decision corrects across-the-board discrimination affecting a *large* class of an employer's employees, the attorney's fee award should reflect the relief granted." *Id.* at 718 (emphasis added).

In other words, the bigger the class, the bigger the potential class back pay award and the bigger the potential attorney's fee award. Solicitaton of additional class members to join or otherwise participate in a purported class action also enhances the prospect of class certification under Fed. R. Civ. P. 23(c) and thus the potential recovery of back pay and attorney's fees for the class.[5] Plaintiffs' at-

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5. While it may be argued that solicitation of class members is more likely to occur at the pre-certification stage of the litigation, the conditional nature of a Rule 23(c) certification preserves the possibility of such solicitation throughout the proceeding.

torneys in the instant case thus stand to gain financially by soliciting and otherwise communicating with as many purported class members as possible. This may explain why Plaintiffs' attorney, Stella Morrison, obtained retainer agreements from thirty-four purported class members who attended the May 22, 1976 meeting.

The prospect of substantial financial gain to plaintiffs' attorneys as a result of soliciting and encouraging as many class members as possible to join or otherwise participate in the instant litigation necessarily creates the possibility that such solicitation may involve misrepresentation or overreaching, whether intentionally or not. While the record does not show what, if any, misrepresentations occurred when Plaintiffs' attorneys Thibodeaux, Cotton and Morrison personally met with a number of class members and when Plaintiffs' attorney Morrison obtained retainer agreements from thirty-four of the purported class members at the meeting, Title VII class members are particularly susceptible to possible overreaching or misrepresentation. Few laymen understand the complexities of class litigation. Moreover, courts have repeatedly recognized that class members in Title VII litigation often tend to be unlettered, unsophisticated, and unschooled in the technicalities of the law. *See, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970). Personal conversation and personal meetings (such as the one attended by Plaintiffs' attorneys Thibodeaux, Cotton and Morrison on May 22, 1976) can thus eclipse other means of communicating with such persons, making them unusually vulnerable to misrepresentation, overreaching, and undue influence by whoever speaks to them in person. *Ohralik, supra*, at 464, 468.

The fact that Plaintiffs' attorneys have associated lawyers from the Legal Defense Fund to assist in the rep-

resentation of Plaintiffs and the purported class in this matter does not eliminate the possibility of misrepresentation and overreaching in communications with the purported class. While the Legal Defense Fund has a long and illustrious record in the courts of this country, and however laudatory, unselfish, and public-interest oriented the motives of Plaintiffs' attorneys may be in this case, the fact remains that they do stand to gain financially, either directly or indirectly, by expanding the size of the class for which relief is sought.[6] Indeed, if association with the Legal Defense Fund or some other public interest law firm is all that is required to bring communications with purported class members within the protective scope of the First Amendment, when the communications would otherwise be constitutionally unprotected, there would never be another purported class action filed under Title VII which did not have the Legal Defense Fund or some other public interest law firm associated as attorneys for the plaintiffs and the purported class.

In this regard, the Fifth Circuit's suggested analogy between the right of a pre-existing association or organization to engage in collective action to obtain legal redress of constitutionally-protected rights and the right of attorneys in a Title VII action to communicate without re-

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6. In a Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae filed with this Court in *New York Gaslight Club, Inc. v. Carey*, ... U.S. ....., 64 L.Ed.2d 723, ... S. Ct. ..... (1980) (U. S. Supreme Court Docket No. 79-192), attorneys for the Legal Defense Fund described their interest in attorney's fee awards under Title VII as follows: "a growing and substantial portion of the income of public interest law organizations, including that of *amicus*, comes from counsel fee awards. If fees were not available, the litigation programs of such groups would have to be sharply curtailed." *Amicus Brief*, p. 15 n.9. Assuming that attorneys for the Legal Defense Fund are paid on a salaried basis, what difference is there between Fund attorneys and associates of a private law firm, the funding of whose salary may also depend upon their ability to obtain counsel fee awards?

striction with a group of persons formed and identified by the plaintiffs solely for the purposes of the lawsuit is totally unfounded. The right of association guaranteed under the First Amendment has never been extended to every named plaintiff and purported class member in every action brought as a Rule 23 class action under Title VII or any other statute. Indeed, it would be absurd to believe that the availability of any of the rights guaranteed under the Constitution depends upon the style of a pleading in a civil action. Moreover, while the right to associate guaranteed under the First Amendment includes by implication the right not to associate, courts have generally held that it is impermissible for a Title VII class member to "opt out" of a Rule 23(b)(2) class action. *Gonzales v. Cassidy,* 474 F.2d 67 (5th Cir. 1973). The need for court supervision of class communications in a purported Rule 23(b)(2) class action is thus particularly acute, since once a class member is in, he can't get out.

Furthermore, prior to Rule 23(c) certification of a purported class action, there may be no evidence in the record to show whether the interests of the named plaintiffs are antagonistic or in conflict with the interests of certain members of the purported class. As this Court noted in *General Telephone Co. v. EEOC,* ..... U.S. ....., 64 L.Ed.2d 319, ... S. Ct. ..... (1980):

> conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority.

64 L.Ed.2d at 330. A district court's constitutional right to control communications between the named Plaintiffs, their attorneys and purported class members with potentially adverse interests is, therefore, no different than a

district court's constitutional right to enforce a skip-counsel rule.

This does not mean that no constitutional rights are involved in a purported class action brought under Title VII. Clearly, Plaintiffs and their attorneys in this and every other purported class action brought under Title VII have the constitutional right to procedural due process guaranteed under the Fifth Amendment.

While the district court's order in the case at bar prohibits the Plaintiffs, as well as their attorneys, from soliciting or otherwise communicating with purported class members without the prior approval of the district court, such a prohibition is necessary and constitutionally justified by the above-cited case authority to prevent the Plaintiffs' attorneys from doing indirectly, through the Plaintiffs, that which they cannot do directly.

In *Ohralik, supra,* this Court expressly held that "prophylactic" rules governing solicitation, where pecuniary gain under circumstances likely to result in misrepresentation or overreaching is involved, are constitutionally permissible. 436 U.S. at 464, 468. The prospect of pecuniary gain to Plaintiffs' attorneys and the related possibility of misrepresentation or overreaching during any such communication necessarily taint all such communications and justify the type of "prophylactic" order entered by the district court in the case at bar.

While there is, therefore, no need for a district court to take evidence or issue specific findings of facts to support the issuance of an order regarding class communications in any particular Title VII class action, this does not prohibit a district court from taking evidence in a given case, either to further support the entry of an order regard-

ing class communications or to justify the modification of an order previously entered in the action. However, the taking of such evidence is not constitutionally required, and may not be consistent with the expeditious handling of court business or, in the Title VII area, the Congressional mandate that Title VII litigation be processed and resolved by the district court as expeditiously as possible.[7]

In this regard, cases may arise where a district court decides to allow the parties or their attorneys to communicate with actual or purported class members for the purpose of soliciting legal representation (where, for example, the court determines that the named plaintiff is not an adequate representative of the class) or soliciting funds or expenses, or agreements to pay funds or expenses, necessary to the continued maintenance of the action. For example, the named plaintiff might submit evidence that he is financially unable to continue funding the litigation and that without such solicitation the litigation will die. However, for the reasons set forth above, such solicitation is neither constitutionally protected nor constitutionally required.

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7. Section 706(f)(5) of Title VII, 42 U.S.C. § 2000e-5(f)(5), provides: "It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and *to cause the case to be in every way expedited.* If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to Rule 53 of the Federal Rules of Civil Procedure." (Emphasis added.)

CONCLUSION

For all of the reasons set forth above, the class communications proscribed by the district court's order are not constitutionally protected. Part V of the Fifth Circuit's *en banc* decision should, therefore, be vacated, and the district court's order regarding class communications should be affirmed.

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CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing BRIEF OF TALLAHASSEE MEMORIAL HOSPITAL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS have been served this 21st day of January, 1981, by United States Mail, postage prepaid, upon the following counsel of record:

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No. 80-441

In the Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL., PETITIONERS

v.

WESLEY P. BERNARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether the district court, in an uncertified class action alleging systematic employment discrimination based on race, can impose blanket restrictions on communications by the named plaintiffs and their attorneys with potential class members, absent a showing of actual or threatened misconduct.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Attorney General and the Equal Employment Opportunity Commission have enforcement responsibility for Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits, *inter alia*, racial discrimination in employment. The Attorney General also has enforcement responsibility for a variety of other federal civil rights laws, including those requiring nondiscrimination in voting (42 U.S.C. 1971 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c *et seq.*), federally assisted programs (42 U.S.C. 2000d *et seq.*), and housing (42 U.S.C. 3601 *et seq.*). Because the executive branch has limited resources, private court actions are an essential means of effectuating the national policy embodied in these statutes and in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Under Title VII in particular, employees who, with the assistance of private or "public interest" counsel, prosecute class actions to eradicate unlawful employment discrimination are advancing a national policy of "the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). This Court has recognized the role played by the legal staffs of non-profit civil rights organizations in achieving this end. *In re Primus*, 436 U.S. 412 (1978); *NAACP* v. *Button*, 371 U.S. 415 (1963).

The United States has an additional interest in this case because it involves the right of individual Title VII claimants to reject the terms of a settlement negotiated between their employer and the federal government and to pursue instead a private right of action in federal court. While the United States recognizes the strong federal policy favoring voluntary settlement of employment

discrimination claims, it also has an interest in ensuring that the beneficiaries of government-negotiated settlements are not deprived of an opportunity to make an informed choice between accepting the benefits of settlement and privately litigating their claims.

STATEMENT

1. This class action was filed on May 18, 1976, by six present and former employees (respondents herein) of Gulf Oil Company, who seek to represent a class composed of all present and past black employees and all unsuccessful black applicants at Gulf's plant in Port Arthur, Texas. The complaint alleges that Gulf Oil engaged in systematic and continuing employment discrimination against blacks in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981, and requests extensive declaratory, injunctive and monetary relief (J.A. 11-20).[1] Plaintiffs are represented by staff attorneys of the NAACP Legal Defense Fund and local counsel in association with the Legal Defense Fund (J.A. 81, 111-120).

At issue in this case is an order entered by the district court shortly after the complaint was filed and prior to certification of the proposed class, prohibiting the plaintiffs and their attorneys from communicating with prospective class members without prior approval from the court (J.A. 124-127). This restriction on communications was entered without findings of facts and with no showing of actual or threatened misconduct by plaintiffs or their attorneys (see J.A. 46-79, 92-104, 124-127).

Six and one-half months later, the district court granted summary judgment to the defendants (petitioners in this Court) on the ground that the plaintiffs' claims were barred by the statute of limitations and the doctrine of laches (J.A. 170). On appeal, a three-judge panel reversed the latter rulings and, with one judge dissenting, upheld the order restricting communications

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[1] "J.A." refers to the Joint Appendix filed with petitioners' brief.

with potential class members as a permissible and constitutional exercise of the district court's authority to control class actions under Fed. R. Civ. P. 23(d). On rehearing en banc, the court of appeals adopted the panel's opinion on the statute of limitations and laches issues and, by a vote of twenty-one to one, invalidated the "gag" order (J.A. 277). Thirteen of the judges held that the order placed an unconstitutional prior restraint on speech and, in so doing, violated Rule 23 as well (J.A. 231-268). Eight judges declined to reach the constitutional question (J.A. 275, 276), concluding that the order violated Rule 23 because it was issued in the absence of "'a factual showing * * * that unsupervised communications between counsel and named plaintiffs on the one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened'" (J.A. 273).

2. On April 14, 1976, more than one month before this suit was filed, Gulf Oil Co., the EEOC and the United States Department of the Interior entered into a conciliation agreement in settlement of a Commissioner's charge[2] alleging widespread racial discrimination by Gulf against black employees at its Port Arthur plant (J.A. 26-39). Under the agreement, Gulf undertook to cease allegedly discriminatory practices, to establish an affirmative action program with hiring and promotion goals, and to offer back pay to alleged victims of past discrimination, ranging from $2.81 to $5.62 for each month of service (J.A. 26-42). Each person identified as an "affected class member" under the agreement was to receive a letter, signed jointly by Gulf and the EEOC, explaining the back pay offer and instructing those who wished to accept it to sign a waiver within 30 days of receipt releasing Gulf from "any and all claims against [it] as a

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[2] Under Title VII, a Commissioner of the EEOC may file a charge of employment discrimination against an employer without joining individual employees. 42 U.S.C. 2000e-5(b). The EEOC is then authorized to investigate the Commissioner's charge and to attempt to conciliate it with the employer prior to filing suit. 42 U.S.C. 2000e-5(b), 2000e-5(f).

result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future affects of past or present employment practices" (J.A. 31). Gulf agreed to mail each employee a back pay check upon receiving the signed release (*ibid.*).

Pursuant to the conciliation agreement, on May 1, 1976, Gulf sent letters offering back pay and soliciting releases to 614 present and former black employees and 29 female employees at the Port Arthur plant (J.A. 22-23, 128). A sample letter is attached to this brief as an Appendix.[3] The letter did not mention the affirmative action goals or any of the provisions of the conciliation agreement other than the back pay offer. Although it stated that the amount of the offer "was figured according to your plant seniority date," the letter did not otherwise explain the basis for the offer or how the award was computed. "Because this offer is personal in nature," Gulf urged the offerees "not [to] discuss it with others," and promised that "Gulf will likewise respect your complete privacy by not disclosing the amount offered you to other employees or annuitants" (Appendix, *infra*).

The class action complaint in this case was filed approximately three weeks later, on May 18, 1976 (J.A. 11). On May 27, 1976, before answering the complaint and before a class was certified, Gulf filed a motion for an order prohibiting communications between the parties or their counsel and actual or potential class members (J.A. 21). In that motion, Gulf asserted that it had received reports that plaintiffs' attorneys met on May 22 in Port Arthur with their clients and potential class members and that during the course of the meeting a Legal Defense Fund attorney advised the employees not to accept Gulf's back pay offer under the conciliation agreement

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[3] Although this letter was not formally made a part of the record on appeal, its substance was before both the district court (see J.A. 128) and the court of appeals (Brief of United States as *Amicus Curiae* on Rehearing En Banc, Exhibit 1).

because they could recover twice as much in the suit just filed (J.A. 23-24). Gulf further represented to the court that as of that moment, approximately 452 of the 643 employees eligible for back pay had accepted the offer and executed general releases (J.A. 23).

Despite plaintiffs attorneys' denial of Gulf's unsworn allegations, a temporary restraining order was entered the following day prohibiting, without exception, all communications concerning the case by parties or their counsel with potential class members (J.A. 44). The order was not accompanied, or followed, by findings of fact or conclusions of law (J.A. 44-45).

Eleven days later, Gulf filed a request to modify the temporary restraining order so that it could resume making back pay offers pursuant to the conciliation agreement (J.A. 46). In an accompanying brief, Gulf asserted that the same Legal Defense Fund attorney whose alleged conduct it earlier had assailed also recommended at the May 22 meeting that employees who had already signed releases return their back pay checks to Gulf (J.A. 47). In further support of the request, Gulf filed an affidavit signed by an EEOC employee stating that the issues raised in the lawsuit were "almost identical" to those resolved by the conciliation agreement (J.A. 72) and that the lawsuit sought "the same kind of relief" (J.A. 74). Gulf did not, however, then or later, substantiate its allegations against opposing counsel by sworn affidavits, testimony, or other means.

In response, the plaintiffs' attorneys filed affidavits specifically denying Gulf's charges of misconduct[4] and asserting that communication with members of the proposed class was necessary to investigate and prepare the case and to inform affected employees of their statutory

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[4] Two of the attorneys for plaintiffs admitted attending the May 22 meeting at the invitation of their clients and answering questions from potential class members concerning the pending suit and the conciliation agreement (J.A. 115-116, 118). They denied advising potential class members to reject the settlement offer or representing that potential class members could recover twice as much back pay by proceeding with the suit (J.A. 116, 118).

rights (J.A. 111-120). Such communication, they asserted, "is of crucial importance at this time because of the offers being tendered to class members under the Conciliation Agreement entered into between the EEOC and Gulf Oil Company" (J.A. 114). Counsel also stated that they had not received and did not expect to receive compensation from the named plaintiffs or potential class members for their services (J.A. 113, 119). In an accompanying brief, plaintiffs claimed that the relief provided under the conciliation agreement was inadequate because the goals were too low, there was no firm commitment to timetables, and there was no provision for relief from unlawful testing (J.A. 108-109). In addition, plaintiffs noted that the back pay notices did not explain the types and extent of relief in the agreement or the method by which the back pay award was computed (J.A. 109). Based on all of the above, the plaintiffs challenged the constitutionality of the temporary restraining order and the district court's authority under Rule 23 to issue it (J.A. 83-91, 106-110).

3. Without making findings of fact, the district court on June 22 entered the modified order now before this Court (J.A. 124-127). That order, which was explicitly modeled on an order contained in the *Manual for Complex Litigation*, Pt. I, § 1.41 (1977 ed.) (hereinafter "*Manual*"),[5] generally forbade all parties and their attorneys from communicating with potential class members concerning the lawsuit without obtaining prior approval of the proposed communication from the court (J.A. 124). "The communications forbidden by th[e] order include, but are not limited to" (1) solicitation of legal representation, (2) solicitation of fees and expenses, (3) solicitation by defendants of "opt out" requests under Rule 23(b)(3), and (4) "communications * * * which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel,

[5] This section of the *Manual* is presently undergoing revision.

this Court, or the administration of justice" (J.A. 125). The order set forth several exceptions to these prohibitions, including communications between attorney and client, communications between attorney and prospective client when initiated by the prospective client, and communications in the "regular course of business" (*ibid.*). The order also excepted communications to which "any party or counsel for a party asserts a constitutional right," provided that within five days of any such communication the party or attorney files with the court a written copy or summary of it (*ibid.*).

Noting that "the private settlements of charges that the employer has violated Title VII is to be encouraged," the order also permitted Gulf to continue soliciting receipts and releases from employees covered by the conciliation agreement and extended the time for acceptance of the offer for an additional 45 days (J.A. 125-126). In addition, it instructed the clerk of the court to send a notice to the covered employees, the contents of which were set forth in the court's order, briefly describing the pending case and their choice of accepting Gulf's back pay offer or being considered at a later date for inclusion in the potential class (J.A. 126, 128-129).

On July 6, 1976, the plaintiffs moved for permission to distribute a notice to members of the putative class (J.A. 130), and asserted that the communication was constitutionally protected. The plaintiffs further asserted that both Gulf's May 1976 back pay offer and the notice sent by the clerk of the court failed to explain adequately the terms of the conciliation agreement (J.A. 131). The proposed notice alerted black employees to the existence of a lawsuit and urged them to "talk to a lawyer" before signing the release (J.A. 132-133). On August 10, two days after the 45 days for accepting Gulf's offer had expired (J.A. 157, 236), the court denied respondents' motion in a one-sentence order (J.A. 157). Respondents' appeal, consolidated with an appeal from the district court's later order granting summary judgment followed (see pages 2-3, *supra*).

SUMMARY OF ARGUMENT

At issue in this employment discrimination case is the validity of an order, issued by the district court shortly after the class action complaint was filed and prior to class certification, imposing broad restrictions on communications initiated by the named plaintiffs (respondents herein) or their attorneys (the NAACP Legal Defense Fund) with potential class members—present and past black employees at Gulf's plant in Port Arthur, Texas and unsuccessful black applicants. The order impaired respondents' ability to investigate their claims and to prepare for trial. In addition, it prevented respondents and their attorneys from providing information about the lawsuit to potential class members at a time when Gulf was tendering back pay to and seeking releases from them in connection with an independently-negotiated conciliation agreement believed by respondents to be inadequate.

Petitioners have failed to demonstrate that the order was an "appropriate" exercise of the district court's Rule 23(d) discretion to control the conduct of class actions. As petitioners concede, orders issued under this authority are subject to review for abuse of discretion. They also must be consistent with the purposes underlying Rule 23 and warranted by the particular facts of the case. The moving party thus must demonstrate by reference to specific facts that unsupervised communications by parties and their counsel with potential class members have materialized into actual abuses of the class action device or that abuses are imminently threatened.

The order here did not meet this standard; it was imposed without findings of fact and without any showing of actual or threatened abuse. Also, on this record it is at least arguable that the order worked against the interests of the absent potential class members.

Moreover, the order fails to satisfy constitutional standards under the First Amendment. It places a substantial burden on the First Amendment rights of re-

spondents and their attorneys to speak freely concerning the case and to associate for purposes of eliminating racial discrimination through litigation. Although the district court has a legitimate interest in protecting class members, preventing misrepresentation, and furthering the proper administration of justice in class action cases, those interests do not justify the particular means employed here—a blanket restriction on speech. As we have noted, the record contains no evidence, and the district court made no findings, that respondents or their attorneys had engaged or were likely to engage in improper or unethical conduct or that they posed a threat to the administration of justice. Nor was the order precisely tailored to restrict only those communications determined to pose a substantial threat to the legitimate interests purportedly being served. In any event, there are a number of readily available alternative means of serving those interests that do not involve such broad restrictions on speech.

ARGUMENT

THE DISTRICT COURT'S ORDER, WHICH IMPOSES BROAD RESTRICTIONS ON COMMUNICATIONS BETWEEN THE PARTIES OR THEIR ATTORNEYS AND POTENTIAL CLASS MEMBERS, IS NOT AN APPROPRIATE EXERCISE OF THE COURT'S POWER TO GOVERN CLASS ACTION PRACTICE AND FAILS TO SATISFY FIRST AMENDMENT STANDARDS

The private right of action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) is an essential means of enforcing that statute's guarantees against racial discrimination in employment. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). As this Court has said, the private Title VII plaintiff acts "not for himself alone but as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968).

Recognizing this strong national policy, the Court consistently has upheld the right of private parties to seek

complete relief in federal court not only for themselves, but for all persons similarly situated as well. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). As a practical matter, the exercise of that right hinges on the use of the class action device. Perhaps recognizing as much, the drafters of the 1966 amendments to Fed. R. Civ. P. 23 specifically contemplated that Subsection (b)(2) of the Rule would be particularly appropriate for litigating civil rights cases "where a party is charged with discriminating unlawfully against a class * * *." Notes of Advisory Comm. on Rules, 1966 Amendments to Fed. R. Civ. P. 23. And, as its drafters predicted, Rule 23(b)(2) repeatedly has been used for this purpose. See, *e.g.*, *Franks* v. *Bowman Transp. Co.*, *supra* (employment discrimination); *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978) (same), cert. denied, 442 U.S. 934 (1979); *Gore* v. *Turner*, 563 F.2d 159 (5th Cir. 1977) (housing); *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir.), cert. denied, 385 U.S. 851 (1966) (voting rights); *Cypress* v. *Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4th Cir. 1967 (hospital services). See generally 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1776 (1972).

The order at issue in this case places a substantial burden on the exercise of the right under Title VII to litigate both individual and class claims of employment discrimination. Access to potential class members is necessary to develop the facts of a case and to prepare witnesses for trial. In addition, discovery from potential class members is frequently necessary to establish that the class is an appropriate one for certification. See, *e.g.*, *Pittman* v. *E.I. duPont de Nemours & Co., Inc.*, 552 F.2d 149 (5th Cir. 1977). By severely restricting the circumstances under which respondents and their attorneys can communicate with potential class members, the order thus impedes the development, presentation and determination of facts relevant to the Title VII claims at issue. The order also lessens the ability of respondents and their attorneys to encourage other Gulf employees

to participate in the suit. Contrary to petitioners' suggestion that such activity is an "abuse[]" of Rule 23 (Pet. Br. 22-23), we believe that it effectuates the primary policy underlying the Rule of resolving similar claims in a single lawsuit. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550 (1974).[6] Indeed, Rule 23 has been interpreted as authorizing (rather than forbidding) individuals to encourage common participation in a Title VII suit. *Coles* v. *Marsh*, 560 F.2d 186 (3d Cir.), cert. denied, 434 U.S. 985 (1977); *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927 (7th Cir. 1972).

In light of these considerations, it is our view that the district court's order was not an approriate exercise of the court's power under Rule 23 to govern class action practice and, indeed, exceeded established constitutional limitations.

A. The District Court's Order is Not an "Appropriate" One under Rule 23(d) Absent a Showing of Actual or Threatened Misconduct by Respondents or Their Attorneys

We recognize that the majority below premised its decision on the First Amendment and that the sole question as to which this Court granted certiorari involves the constitutionality vel non of the district court's order. As we explain below (see Part B, *infra*), in our view that order imposes an unconstitutional restraint on speech. However, in light of the existence of a dispositive non-constitutional ground for affirmance (see, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)), we first address the order's invalidity under Fed. R. Civ. P. 23.

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[6] As the Court observed in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 339 (1980) "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

Petitioners contend that the district court's authority[7] to issue an order restricting communications flows from Rule 23(d), which provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given * * * of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons * * *; (5) dealing with similar procedural matters. * * *.

As its drafters observed, Subsection (d) is designed to facilitate "the fair and efficient conduct of" class actions.[8] Notes of the Advisory Comm., 1966 Amendment to

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[7] We note that an additional source of authority is provided by Rule 83, which permits district courts to adopt local rules consistent with the federal rules and, where no rule applies, to regulate practice in any manner consistent with the federal rules. See *Coles* v. *Marsh*, 560 F.2d 186 (3d Cir.), cert. denied, 434 U.S. 985 (1977). The district court also has inherent power to control the conduct of litigants and attorneys who appear before it. *Roadway Express, Inc.* v. *Piper*, No. 79-701 (June 23, 1980). The exercise of these powers, however, must be consistent with the purposes underlying Rule 23 and is subject to reversal on appeal for abuse of discretion. *Coles* v. *Marsh, supra.* Of course, the *Manual* merely provides guidelines for use in complex and multi-district federal cases and cannot itself confer additional power on the district court.

[8] Among the orders commonly issued under Rule 23(d) are orders consolidating cases, designating general counsel, creating subclasses, establishing timetables for discovery and trial, and fixing cut-off dates for intervention. See, *e.g.*, *In re Air Crash Disaster*

Rule 23. To that end, Subdivision (d)(3) "reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, * * * and recognizes that the imposition of conditions on interven[ing class members] may be required for the proper and efficient conduct of the action." Notes of the Advisory Comm., *supra.*

Thus the district court's authority under Rule 23(d) is broad and doubtless includes the power to protect absent or potential class members. However, that authority is not unlimited. As petitioners concede (Pet. Br. 16, 21 n.15), orders issued under Rule 23(d) are subject to appellate review for abuse of discretion. See, *e.g.*, *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340 (1978) (reversing an order requiring defendant to bear costs of identifying members of plaintiff class). Moreover, such orders may not impose unwarranted substantive conditions on the maintenance of class action suits. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). To be "appropriate" under Rule 23(d), orders must be consistent with the purposes underlying Rule 23 and justified by the particular facts of the case.

In determining whether an order is "appropriate," the district court should of course consider the interests of absent class members. See *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1096 (5th Cir. 1977) (appellate review of Rule 23(d) orders is necessary "to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision"). But the interests of absent class members is only one of a cluster of interests that must be weighed by the court in controlling the conduct of class actions. In *Deposit Guaranty National Bank* v. *Roper*, *supra*, 445 U.S. at 331, this Court recently identified at least four such interests:

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at *Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1012 n.8 (5th Cir. 1977) (appointing lead counsel); *City of Philadelphia* v. *Morton Salt Co.*, 385 F.2d 122 (3d Cir. 1967), cert. denied, 390 U.S. 995 (1968) (establishing cut-off date for closing of class); see generally 7A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1791-1796 (1972).

> First is the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims. A separate consideration, distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interests of the putative class. Two other interests are implicated: the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it.

Because the nature and strength of these interests will vary from case to case, the district court must make a case-by-case determination of what is "appropriate" for the "fair and efficient conduct of the action."

As we have shown (pages 10-11, *supra*), an order restricting communications with potential class members impairs the named plaintiffs' ability to discover and litigate individual and class claims and, more broadly, to represent the interests of the class. In addition, such an order may well harm potential class members directly by restricting their opportunity to obtain information about their legal rights and remedies and to pursue, if they choose, a common claim. Given these major drawbacks, the mere generalized potential for abuse of the class action mechanism is not sufficient, in our view, to justify as appropriate an order broadly restricting communications with the putative class. As the court of appeals implicitly recognized (J.A. 262-263), the class action device is not so inherently conducive to misuse as to justify an assumption in every case that misconduct is likely to occur. Such an assumption is all the more unwarranted where, as here, respondents are represented by a public interest law firm that has "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," and is engaged in "a different matter from

the use of the * * * legal process for purely private gain." *NAACP* v. *Button*, *supra*, 371 U.S. at 422, 443. The *Manual* itself recognizes that abuses of the class action device are exceptions rather than the rule (*Manual*, *supra*, § 1.41 at 31).[9]

A request for an order restricting communications with potential class members is not essentially different from a request for a protective order under Fed. R. Civ. P. 26(c) or for a preliminary injunction under Rule 52(a) to achieve the same end. See *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979). Just as a protective order can be en-

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[9] As illustrations of "abuses" of the class action procedure, the *Manual* cites seven cases, four of which involve conduct that would not be prevented by the *Manual's* proposed order. *Ace Heating and Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971) (defendants negotiated settlement of class action with second set of plaintiffs' attorneys after first set declined offer); *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970) (motion to withdraw class allegations to effectuate individual settlement); *Rothman* v. *Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971) (same); *Wainwright* v. *Kraftco Corp.*, 53 F.R.D. 78 (N.D Ga. 1971) (joint motion to approve settlement). Two of the remaining three cases involve conduct bearing little resemblance to the activities here. *Korn* v. *Franchard Corp.*, 1971 Sec. L. Rep. ¶ 92,845 (S.D.N.Y. 1971), rev'd, 456 F.2d 1206 (2d Cir. 1972) (under a pseudonym, class attorney sought unauthorized discovery in unrelated case); *Northern Acceptance Trust 1065* v. *Amfac, Inc.*, 51 F.R.D. 487, 491 (D. Hawaii 1971) (defendants solicited affidavits from plaintiff class denying that plaintiffs represented affiants). Only *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972), appeal dismissed, No. 72-1065 (5th Cir. June 23, 1972), involved solicitation by a class member (who also served as class counsel) of others willing to have a class action initiated in their names. This case predates recent decisions invalidating traditional prohibitions on lawyer advertising and solicitation (see, *e.g.*, *In re Primus*, *supra*; *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)) and apparently involved solicitation for financial gain. Compare *Ohio* v. *Richter Concrete Corp.*, 69 F.R.D. 604, 606-607 (S.D. Ohio 1975). Significantly, the Court's reference in *Deposit Guaranty National Bank* v. *Roper*, *supra*, 445 U.S. at 339, to the "potential for misuse of the class action mechanism" concerned the financial incentive that class actions offer to the private bar, and not the nonprofit activities of organizations such as the Legal Defense Fund. See note 12, *infra*.

tered only upon a finding of "good cause," *In re Halkin, supra,* and a preliminary injunction requires, *inter alia,* a factual showing that the need for the order outweighs its disadvantages (see, *e.g., Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980)), so too an order restricting communications under Rule 23(d) should be premised on a finding that the need for it outweighs the advantages of unrestrained, or less restrained, communications. To meet its burden of proof, the moving party should be required to make a particularized showing that unsupervised communications with potential class members have materialized into actual abuses of the class action device or that such abuses are imminently threatened (J.A. 273). In addition, "the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties." *Coles* v. *Marsh, supra,* 560 F.2d at 189; *Rodgers* v. *United States Steel Corp.,* 508 F.2d 152 (3d Cir. 1975), cert. denied, 423 U.S. 832 (1975); see also *In re Halkin, supra.*

In issuing its order restricting communications in this case, the district court made no factual findings.[10] Rather

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[10] Since Rule 23(d) orders are reviewable (*Oppenheimer Fund, Inc.* v. *Sanders, supra*), they must be based on findings of fact. The reasons for this requirement were summarized by the First Circuit in *Sargeant* v. *Sharp,* 579 F.2d 645, 647 (1978) (citations omitted):

> [I]ssuance of an order * * * without an adequate statement of the reasons for the order does not meet minimum fairness and regularity * * *. Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

This Court has repeatedly emphasized that a district court, in exercising its equitable powers, must articulate specific findings in support of its conclusions. See, *e.g., Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 419 (1977). The concurring judges in the court of appeals correctly concluded that this principle applies

than weighing the competing interests that would be benefited and burdened by such an order, the court simply imposed a blanket rule in accordance with the *Manual's* recommendation that that be done in every class action. Petitioners nevertheless contend that "the district court acted only after compiling a complete record showing the class action process was threatened by abuse" (Pet. Br. 22), and that the order was therefore appropriate under Rule 23. As evidence of a threatened abuse, they cite two affidavits in which respondents' attorneys admitted attending at respondents' invitation a meeting of potential class members shortly after suit was filed. The attorneys discussed the issues in the case, answered questions from the audience, and explained the administrative and legal problems inherent in the litigation (J.A. 115-116, 118). Apparently implying that these activities amounted to improper solicitation, petitioners conclude: "Thus, the plaintiffs created and their attorneys participated in the type of activity which the *Manual's* recommended order was designed to control" (Pet. Br. 23).[11]

"to any court order that is based on the court's assessment of conflicting evidence or policy considerations," including orders under Rule 23(d) (J.A. 272). Accord, *Coles* v. *Marsh*, *supra*. The district court's failure to articulate findings of fact in support of its order provides an additional basis for concluding that the order was not an "appropriate" exercise of discretion under Rule 23(d).

[11] Petitioners also represent as fact mere allegations made in their district court briefs (Pet. Br. 23). In originally seeking an order restricting communications, petitioners' memorandum of law stated: "it is reported to Gulf that [a Legal Defense Fund attorney] advised this group that they should mail back to Gulf the checks they had received since he could recover at least double the amount which was paid to them under the conciliation agreement by prosecuting the present lawsuit" (J.A. 23-24). Petitioners made similar unsworn allegations in a subsequently filed memorandum (J.A. 47). The two Legal Defense Fund attorneys who were present at the meeting filed affidavits specifically denying these unsworn charges (J.A. 115-116, 118), and petitioners never submitted substantiating affidavits or testimony. At the "hearing" held prior to entry of the order (see Pet. Br. 22 n.16), the district court heard oral argument but did not receive evidence. Both the

We do not agree that providing information about the lawsuit to potential class members and answering questions concerning their rights somehow constitute "abuses" that should be discouraged. To the contrary, in our view such activity is constitutionally protected and, in addition, is consistent with the purposes underlying Rule 23. See pages 10-11, 14, *supra*, and pages 26-27, *infra*.[12]

Petitioners also argue that the order was appropriate in this case because it was issued in the midst of an ongoing conciliation process when potential class members were particularly vulnerable to misrepresentations and undue influence (Pet. Br. 22-26). However, even if the underlying premise is true, and even if that circumstance might justify a more narrowly drawn protective order than was involved here,[13] it is a consideration that must

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three-judge panel of the court of appeals and the en banc court correctly concluded that on this record the above charges were entitled to no weight (J.A. 195, 241).

[12] Under the Code of Professional Responsibility, the activity involved here—attending a meeting at the invitation of named plaintiffs, providing information to potential class members and answering their questions—does not constitute improper solicitation of representation, even when engaged in by private attorneys. DR 2-104(A)(2), (A)(5), ABA Code of Professional Responsibility (1978). Canon 2 in fact encourages members of the bar "to facilitate the process of intelligent selection of lawyers and to assist in making legal services fully available." EC 2-1, *supra*. Moreover, the Code's limitations on solicitation specifically exempt non-profit organizations such as the Legal Defense Fund. DR 2-104(A)(3), *supra*. Also compare *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), with *In re Primus*, *supra*; *NAACP* v. *Button*, *supra*. Since respondents' attorneys do not expect to receive compensation from respondents or from the potential class for their services even on a contingent basis (J.A. 113, 119), this case does not involve solicitation of fees or expenses.

[13] The cases cited by petitioners recommending court supervision of individual settlement offers made while a class action is pending were concerned with the possibility that the defendant, in soliciting individual settlements with plaintiff class members, would misrepresent the strength of the class claims and that as a result "the class action vehicle would be eviscerated." *American*

be balanced against the fact that individual victims of employment discrimination have an absolute right under Title VII to reject the terms of a conciliation agreement or consent decree negotiated between the government and their employer. See *Alexander* v. *Gardner-Denver Co., supra; United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 848 n.26 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Indeed, private plaintiffs can proceed to trial even after such a consent decree has been approved by the court as fair, lawful and reasonable. *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 333 (1980); *United States* v. *City of Jackson*, 519 F.2d 1147 (5th Cir. 1975). Moreover, releases given by actual or potential class members in conjunction with an offer of settlement are invalid unless they are the product of a knowing and voluntary waiver of the right to litigate or seek further redress. *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 52 n.15.[14]

Finance System, Inc. v. *Harlow*, 65 F.R.D. 572, 576 (D. Md. 1974); see also *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1130-1140 (7th Cir.), cert. denied, 444 U.S. 870 (1979); *Chrapliwy* v. *Uniroyal, Inc.*, 71 F.R.D. 461, 464 (N.D. Ind. 1976).

[14] A waiver of remedial rights guaranteed by federal civil rights laws "is not lightly to be inferred." *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1172 (5th Cir.), cert. denied, 429 U.S. 861 (1976). Before it may be concluded that an employee has elected to waive the right to present a claim of discrimination in a judicial forum, it must be shown that at the time of executing the release the employee was given a full explanation of the consideration for the waiver and that he or she fully understood the extent of the bargain. *Cox* v. *Allied Chemical Corp.*, 538 F.2d 1094, 1098 n.5 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978). That explanation must cover not only the monetary award and other benefits to be received but also the remedial rights to be given up. *Watkins* v. *Scott Paper Co., supra.* In addition, the employee must be given "ample opportunity to reflect and seek advice" concerning the choice. *Rodgers* v. *United States Steel Corp.*, 70 F.R.D. 639, 647 (W.D. Pa. 1976) (on remand). Releases obtained in violation of these requirements are subject to collateral attack. See, *e.g.*, *Winfield* v. *St. Joe Paper Co.*, 20 F.E.P. Cas. 1103 (N.D. Fla. 1979).

In this case, the potential members of the plaintiff class were faced with a choice between accepting Gulf's back pay offer and being considered for inclusion in respondents' class action. The broad order imposed here prevented respondents and their attorneys from providing information about the suit to class members despite respondents' contention that some of the issues addressed by the suit—such as the validity of employment tests—were not covered by the conciliation agreement and that the benefits provided for in the agreement were inadequate. Therefore, rather than protecting potential class members, the district court's order tended to deprive them of their most likely source of information and legal advice at the very time they were being required to elect between alternative modes of redress. See *Rodgers* v. *United States Steel Corp.*, *supra*. As the court of appeals correctly recognized, "[t]he choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice" (J.A. 266).[15]

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[15] Prior to the May 22 meeting attended by respondents' counsel, the only information potential class members received concerning their options was Gulf's letter offering back pay and soliciting releases. This letter was insufficient to enable them to make an informed choice between accepting Gulf's back pay offer and pursuing their private right of action. The letter did not include a copy of either the conciliation agreement or the Commissioner's charge that triggered the settlement discussions. Nor did it describe any provisions of the agreement, such as the affirmative action goals, other than the back pay offer. Its description of the back pay offer failed to describe the formula used to compute the amount of each employee's monetary award, and did not even explain the general basis for the award. Rather than encouraging the employees to reflect on and seek advice concerning the offer, the notice instructed the employees not to discuss the offer with anyone. It urged employees to sign a general release and at the same time informed them that they retained full rights to administrative and legal processes (see Appendix, *infra*).

Thus, petitioners failed to show, and the district court did not find, that either respondents or their counsel acted inappropriately or that the specific circumstances of this case justified an order broadly restricting communications with the putative class. The order therefore was not "appropriate" under Fed. R. Civ. P. 23(d).

B. The District Court's Order Imposes an Unconstitutional Restraint On Speech

1. We recognize that a district court, in furtherance of the fair administration of justice, has broad power to control the course of litigation and the conduct of litigants and attorneys who appear before it (*Roadway Express, Inc.* v. *Piper*, No. 79-701 (June 23, 1980)) and to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences" (*Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966). Indeed, in its day-to-day activities, a district court frequently restricts the speech and association of participants in the proceedings, as well as the speech of observers, to ensure that the proceedings are conducted efficiently, with proper decorum and without outside influence. While most such restrictions simply regulate the time, place or manner of speech in the courtroom (cf. *Consolidated Edison Co.* v. *Public Service Commission*, No. 79-134 (June 20, 1980)), in appropriate circumstances such restrictions may extend beyond in-court speech to extrajudicial discussions of or publicity on pending litigation. For example, a district court may properly instruct the jury not to discuss the pending case with non-jurors until a verdict had been reached,[16] or may

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[16] In contrast to the order at issue here, such an instruction meets First Amendment standards (see page 26, *infra*). It is narrowly tailored to prohibit precisely those communications which pose a danger of outside influence to the jury's deliberations. In addition, its meaning is clear and the compelling interest being served—protecting the integrity of the trial process—is present in every case.

prohibit counsel from disclosing matters revealed in camera.[17] In appropriate settings, the dangers of solicitation for private gain or of misrepresentation could justify a narrowly tailored regulation of speech. *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978). And a court may conclude that the danger of misrepresentation or overreaching in a particular case justifies judicial examination of an offer by the defendant to settle with individual members of the plaintiff class or, in Rule 23(b)(3) cases, of attempts to solicit opt-out requests. *In re General Motors Corp. Engine Litigation*, 594 F.2d 1106, 1139-1140 (7th Cir. 1979). Nevertheless, court-imposed restrictions on parties and attorneys are disfavored outside of these narrow contexts[18] and must be carefully scrutinized to ensure that they comply with constitutional requirements.

In the present case, the court of appeals correctly concluded that the order at issue operates as a classic prior restraint on speech. Typically, a prior restraint places specified communications under the personal censorship of a judge or administrative authority. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *In re Halkin*, *supra*, 598 F.2d at 184 n.15; *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 278 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).[19] Its purpose is to suppress un-

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[17] Attorneys, of course, "have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

[18] In civil cases, where the competing interest of the defendant's Sixth Amendment right to a fair trial is not present, court orders or statutes prohibiting comments on pending cases generally have been struck down, both when directed toward the press (see, *e.g. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Wood* v. *Georgia*, 370 U.S. 375 (1962)), and when imposed on parties and their attorneys (see, *e.g.*, *In re Halkin*, *supra*; *Hirschkop* v. *Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Chicago Council of Lawyers* v. *Bauer*, *supra*; *CBS, Inc.* v. *Young*, 522 F.2d 234 (6th Cir. 1975)).

[19] A judicial restraint on speech generally carries with it a greater certainty of punishment than a criminal statute or other legislative prohibition on speech. "While a statute poses only a

desirable speech before it takes place. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-559 (1975); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418-419 (1971). To avoid violating a directive imposing such a restraint, the speaker must seek clearance in advance and bears the burden of persuading the tribunal that the speech is unobjectionable.[20]

The district court's order in this Court was a prophylactic measure, the purpose of which was to suppress speech before it took place rather than to punish past misconduct. As the court of appeals observed, the order had its intended effect (J.A. 248-249; footnote omitted):

> It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, questioned by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue despite the contentions of

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'mute, impersonal threat,' a judicial order singles out particular individuals, increasing both the likelihood of punishment if the order is violated and the probability that protected speech will be chilled regardless of the defenses which may ultimately be available in subsequent proceedings." *In re Halkin*, *supra*, 598 F.2d at 184 n.15; *Rodgers* v. *United States Steel Corp.*, *supra*, 508 F.2d at 161.

[20] In contempt proceedings for violating a prior restraint, the penalty is imposed quickly and often is not accompanied by all of the procedural safeguards associated with criminal proceedings. As the Court stated in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976) (footnotes omitted):

> A criminal penalty * * * is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

> plaintiffs' counsel that some of the issues in the suit were not covered by the conciliation agreement to which plaintiffs and putative class members were not parties and that the conciliation benefits to the putative class were inadequate. It stopped investigation and discovery at a time when it is critical, just after suit has been filed.

Moreover, as petitioners concede (Pet. Br. 33 n.37), the order was to be enforced through the court's criminal contempt power rather than through the criminal justice system. And like prior restraints on public comment on pending or anticipated trials (see, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, *supra*; *CBS* v. *Young*, 522 F.2d 234, 239 (6th Cir. 1975)), the order placed proposed communications under the personal censorship of the district court.

Petitioners construe the order's express exception for communications to which a party or counsel "asserts a constitutional right" (J.A. 125) to permit the constitutionality of a communication, or the communicator's good faith belief in its constitutionality, to be asserted as a defense in contempt proceedings, and urge that so long as the five-day filing requirement is met, the order "freely allows" litigants and attorneys to exercise their First Amendment rights (Pet. Br. 17, 32-33). But the protection purportedly offered by the exception is illusory. The filing requirement is so onerous and the "good faith" defense so fraught with uncertainty that the order nevertheless operates as a prior restraint on speech.

The filing requirement itself chills expression by imposing a substantial burden on respondents and their attorneys. It requires that a copy of every written communication and a "complete summary" of every oral communication between respondents or their attorneys and a potential class member be filed with the court. Respondents could well find compliance with this requirement impossible since it presupposes that they know what is constitutionally protected and that they possess the means to comply.

The exception has an additional serious chilling effect because it makes guilt or innocence on criminal contempt charges depend on the assertion of "good faith." As a practical matter, neither a party nor an attorney can safely take refuge in the exception since there is no certainty that, or even predictability regarding whether and when, the good faith defense will be credited. It may not be as easy to establish "good faith" as petitioners appear to assume. For example, where, as here, the court denies the plaintiff's request for permission to distribute to prospective class members a notice they correctly believe to be constitutionally protected, it is by no means clear that they could thereafter proceed to distribute a similar notice in good faith. Significantly, the exception offered little comfort to the respondents' attorneys in this case, who already had been accused by petitioners of misconduct. As the court of appeals concluded, "[m]ost attorneys, faced with an order like the one before us, would pursue the course chosen by counsel in this case and seek prior approval of the court before attempting to communicate with actual or potential class members" (J.A. 252).

While a prior restraint on expression is not unconstitutional per se, it is subject to a "heavy presumption" against its unconstitutionality, and the burden of justification is heavier than that imposed on subsequent restrictions on speech. *Southeastern Promotions, Ltd.* v. *Conrad, supra; New York Times* v. *United States*, 403 U.S. 713 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The greater protection against prior restraints reflects the established First Amendment principle that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad, supra*, 420 U.S. at 559 (emphasis added). Petitioners have failed to overcome this "heavy presumption" in seeking to justify the broad restraint imposed in this case.[21]

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[21] There obviously has been no showing that the expression sought to be restrained " 'surely [will] result in direct, immediate

2. Indeed, whether the district court's order is viewed as a prior or subsequent restraint on speech, petitioners have not demonstrated that it satisfies constitutional standards. Attempts to punish or restrict speech after the event, while not presumptively invalid, must nevertheless withstand exacting scrutiny, both of the interests asserted to justify the restriction and the means used to achieve the asserted goals. See, *e.g.*, *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 102, 105 (1979). Thus, the party seeking to uphold the subsequent restraint must demonstrate that it serves a "state interest of the highest form" (*ibid.*) and one that is "compelling" (*First National Bank of Boston* v. *Belloti*, 435 U.S. 765, 786 (1978)). Even a legitimate governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). See *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Smith* v. *Daily Mail Publishing Co.*, *supra*. In addition, the restrictions' meaning must be clear because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' * * * than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972) (citations and footnotes omitted).

Relying on the *Manual*, *supra*, petitioners attempt to justify the district court's order as an appropriate means of preventing solicitation and misrepresentation, of protecting absent class members from other "abuses" of the class action procedure and of furthering the proper administration of justice (Pet. Br. 27, 29, 35). However, under *NAACP* v. *Button*, *supra*, and its progeny,[22] petitioners have no

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and irreparable damage.'" *International Society for Krishna Consciousness* v. *Eaves*, 601 F.2d 809, 833 (5th Cir. 1979), quoting *New York Times Co.* v. *United States*, *supra*, 403 U.S. at 730 (Stewart, J., joined by White, J., concurring).

[22] *In re Primus*, *supra*; *United Transp. Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen* v. *Va. State Bar*, 377 U.S. 1 (1964).

legitimate interest in seeking to prohibit solicitation of representation or participation in the suit by respondents or their attorneys. As these cases recognize, respondents and their attorneys have a constitutional right to associate and speak with Gulf's employees in an effort to eliminate racial discrimination and to use litigation as a vehicle for achieving that end. This right encompasses solicitation of other persons to bring and participate in civil rights suits, at least in the absence of evidence not present here of overreaching, misrepresentation, or other misconduct. *In re Primus, supra,* 436 U.S. at 432.

With respect to the other interests asserted, we recognize that First Amendment protections are not unlimited, and that the district court has a legitimate interest in preventing misrepresentation, undue influence and other substantive evils tending to impede the fair administration of justice or the proper conduct of class actions. See, *e.g., Roadway Express, Inc.* v. *Piper, supra; In re Primus, supra,* 436 U.S. at 426. "[T]he right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government." *Wood* v. *Georgia, supra,* 370 U.S. 375, 388 (1962).

Nevertheless, these legitimate interests do not justify the particular means employed here—a blanket restriction on out-of-court speech imposed in the absence of any showing of a need to protect such interests in this case. As we have noted (see pages 4-6, 17, *supra*), the record contains no evidence, and the district court did not find, that respondents or their attorneys had engaged in or were likely to engage in misrepresentation, overreaching or other improper conduct. Nor is there evidence that they otherwise posed a threat to the fair administration of justice.

The district court's order thus fails to satisfy a fundamental First Amendment principle: "[r]ights of political expression and association may not be abridged because of * * * interests asserted by appellate counsel without substantial support in the record or findings of the * * *

court." *In re Primus, supra,* 436 U.S. at 434 n.27 (citations omitted). Accord, *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 789; *Wood* v. *Georgia, supra,* 370 U.S. at 388; *Bridges* v. *California,* 314 U.S. 252, 271 (1941).[23] As *In re Primus* demonstrates, this principle specifically applies to prophylactic rules intended to prevent attorney misconduct such as "undue influence, overreaching, misrepresentation, invasion of privacy, [and] conflict of interest." 436 U.S. at 432. To justify a restriction on protected speech in this context, there must be a showing not that potential danger exists, but that the activity "in fact involved th[is] type of misconduct." *Id.* at 434.

Even if there had been a showing of actual or potential misconduct in this case, the order is unconstitutionally overbroad because it is not precisely tailored to restrict only those communications determined to pose a substantial threat to the legitimate interests purportedly being served.[24] This Court has repeatedly stated that

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[23] The Court stated in *Bridges* (*ibid.*):

> [W]e cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials * * *. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

[24] The constitutional infirmity of the order would not be cured if the four types of speech specified therein were exclusive rather than illustrative (see pages 6-7, *supra*). While a court may have a legitimate interest in prohibiting improper solicitation of representation, of funds and of opt-out requests where there is a danger of improper conduct, there is no justification for doing so here. As we have shown, efforts by respondents or their attorneys to solicit representation are constitutionally protected, and the attorneys have not sought nor do they expect to receive compensation for their services from their clients or the potential class (J.A. 113, 119). Therefore, the prohibitions in subparagraphs 2(a) and (b) of the order may not be constitutionally imposed in

"[b]road propylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *." *NAACP* v. *Button*, *supra*, 371 U.S. at 438 (citations omitted). That is so because "First Amendment freedoms need breathing space to survive * * *." *Id.* at 433; accord, *Village of Schaumburg* v. *Citizens for a Better Environment*, *supra*, 444 U.S. at 637; *In re Primus*, *supra*, 436 U.S. at 426. There is no reason to depart from these established principles in this case. As we have noted (pages 14-15 & note 9, *supra*), the class action procedure is not so inherently conducive to abuse as to justify an assumption that misconduct will occur in every case, particularly in a Title VII action such as this where respondents are represented by a non-profit organization with recognized expertise in civil rights litigation. Rule 23 provides a mechanism for balancing in each case the interests in unsupervised communications against the need to protect class members from a particular abuse.

The protection afforded speech and association in this context by the First Amendment would obviously be illusory if every conceivable threat of misrepresentation or other danger to potential class members, however remote or speculative, were sufficient to justify a blanket restriction on speech. As we have noted (pages 21-22, *supra*), a district court in the conduct of trials places significant restraints on the free expression and as-

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this case. The prohibition against solicitation of opt-out requests by defendants in subparagraph 2(c) by its terms is limited to class actions brought under Rule 23(b)(3). Since this case was brought under Rule 23(b)(2), subparagraph (2)(c) similarly does not apply. Finally, subparagraph (2)(d) prohibits all communications "which may tend to misrepresent * * * the class action" and "which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice" (J.A. 125). The court of appeals was correct in concluding that this provision merely compounds the unconstitutionality of the order because of its vagueness and overbreadth (J.A. 256 n.26). See also *Hirschkop* v. *Snead*, *supra*; *Chicago Council of Lawyers* v. *Bauer*, *supra*, 522 F.2d at 249; *Zarate* v. *Younglove*, 86 F.R.D. 80, 101 (C.D. Cal. 1980).

sociation of litigants, attorneys, and other participants in the proceedings. But "[w]hatever may be the limits of a court's powers in this respect, it seems that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world." *Rodgers* v. *United States Steel Corp., supra,* 508 F.2d at 163. Even where the competing interest is the accused's constitutional right to a fair trial, restrictions on First Amendment rights cannot be imposed "absent an overriding interest articulated in findings." *Richmond Newspapers Inc.* v. *Virginia,* No. 79-243 (July 2, 1980). If the demands of the Sixth Amendment do not lessen the burden on those who seek to justify a prior restraint on comments on pending litigation, certainly the interests of a civil litigant cannot do so. See *Hirschkop* v. *Snead, supra,* 594 F.2d at 373.

The fact that a back pay offer was pending in this case does not change this principle. To be sure, the speech of respondents and their attorneys may have influenced potential class members in exercising their choice to accept Gulf's settlement offer or to pursue their private right of action. But even in the commercial speech area, the First Amendment rejects the "highly paternalistic" approach of restrictions on what individuals may hear. *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 790-792; *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 770 (1976); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 97 (1977). As the court stated in *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 791-792 (citations omitted):

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a

danger contemplated by the Framers of the First Amendment.[25]

In any event, there are a number of alternative means of serving the interests asserted by petitioners that do not involve such broad restrictions on speech. If, parties or attorneys, in communicating with potential class members, misrepresent the status, purposes or effect of the class action (J.A. 125), remedial notice can be sent to the affected group. See, *e.g.*, *Halverson* v. *Convenient Food Mart, Inc.*, 458 F.2d 927, 929, 932 (7th Cir. 1972).[26] Pur-

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[25] Although petitioners argue that the order was "evenhanded" because it prohibited communications by *any* party or their attorneys with prospective class members, they also concede (Pet. Br. 32 n.34) that the order allowed Gulf to resume the conciliation process under the court's supervision. While we agree that a court, upon a specific showing of need, may take neutral steps to protect potential class members from misrepresentation in the settlement context, the order in this case was neither justified by the record nor neutral in effect. By giving black employees a second opportunity to accept Gulf's back pay offer and by referring the employees to Gulf's notice of May 1, which did not present the employees' choice in objective terms (see Appendix, *infra;* note 15, *supra*), the order in practice gave preferential treatment to the speech-related activities of petitioners. Such selective regulation of the content of speech violates the First and Fifth Amendments. See, *e.g.*, *Carey* v. *Brown*, No. 79-703 (June 20, 1980); *First National Bank of Boston* v. *Bellotti, supra; Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972). As the Court stated in *First National Bank of Boston* v. *Bellotti, supra*, 435 U.S. at 785 (footnote omitted):

> Especially where, as here, the * * * suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

[26] In class actions brought under Rule 23(b)(3), parties who opt out of the class in reliance on misrepresentations by defendants can be allowed to rejoin. See, *e.g.*, *Zarate* v. *Younglove, supra*, 86 F.R.D. at 90 n.13. In Rule 23(b)(2) cases such as this, potential class members who accept a settlement offer in reliance on incomplete or inaccurate information from defendants can be treated as a separate subclass of plaintiffs. See, *e.g.*, *Winfield* v. *St. Joe Paper Co., supra.*

poseful attorney misconduct can be handled by disciplinary proceedings, the traditional means of policing professional ethics. Improper conduct by parties or attorneys may also be discouraged, where appropriate, by denying or revoking class certification (see, *e.g.*, *Carlisle* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972), appeal dismissed, No. 72-1605 (5th Cir. June 23, 1972); *Taub* v. *Glickman*, 14 Fed. Rules Serv. 2d 847 (S.D.N.Y. 1970)) or by substituting class counsel (see, *e.g.*, *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972); *Flaska* v. *Little River Marine Constr. Co.*, 389 F.2d 885 (5th Cir.), cert. denied, 392 U.S. 928 (1968)). Misuse of the discovery process can be prevented by obtaining, "for good cause shown," a protective order under Fed. R. Civ. P. 26(c) (see, *e.g.*, *IBM* v. *Edelstein*, 526 F.2d 37, 41 n.2 (2d Cir. 1975)) or by invoking the discovery sanctions of Rule 37 (see, *e.g.*, *Roadway Express, Inc.* v. *Piper*, *supra*). Unreasonable or illegal cost-splitting or contingent fee arrangements can be policed in part by refusing to enforce them. Finally, in the rare case in which they are warranted, the court has the inherent power to levy such sanctions as dismissal of the suit or assessment of attorneys' fees directly against opposing counsel (*ibid.*).

It is true that most of these alternatives remedy or punish misconduct after it has occurred rather than prevent it from occurring in the first instance (but see Fed. R. Civ. P. 26(c)). But as we noted above (see page 25, *supra*), implicit in the First Amendment is the judgment that it is preferable to punish the few who actually abuse their privileges than to suppress protected speech beforehand: "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, 420 U.S. at 559.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1981

APPENDIX

May 1, 1976

Dear Mr. Hayes:

In line with its continuing policy of providing equal opportunity to all employees and annuitants, Gulf has recently entered into an agreement with the United States Equal Employment Opportunity Commission and the U. S. Department of the Interior. As part of the written agreement, Gulf has identified certain employees and annuitants to whom back pay will be offered in settlement of past discrimination claims, even though Gulf does not admit to having discriminated against anyone. You are a member of this group of employees and annuitants, and should you accept the terms of this offer, you will immediately receive by certified mail $1,163.34 less legal deductions for social security, if applicable, and income tax. The amount of your back pay was figured according to your plant seniority date, and very probably will not be the same as that of anyone else presented an offer under the agreement.

Because this offer is personal in nature, Gulf asks that you not discuss it with others. Gulf will likewise respect your complete privacy by not disclosing the amount offered you to other employees or annuitants. Even though both you and Gulf may feel that you have not been discriminated against in any way by Gulf, the money is available to you upon acceptance. To help you make a decision, Gulf wants you to understand that the only condition for accepting back pay is that you sign a written statement releasing Gulf from any possible claims of employment discrimination occurring before the date of your release, including any future effects of alleged past practices. Of course, in all other ways you will retain full rights to administrative and legal processes.

Enclosed you will find a written "Receipt and General Release". You may immediately receive your back pay check by completing all questions on the Receipt and General Release, signing before a Notary Public and

returning it in the self-addressed envelope provided. Services of a Notary Public will be provided at no charge by calling 983-3301, ext. 484 or 467. Once you have returned the signed Receipt and General Release, you should receive your check by mail within 7 to 10 days.

If you feel that you cannot respond because you do not understand Gulf's offer, you may contact Mr. C. B. Draper at 983-3301, ext. 467, during normal business hours, to arrange an interview with a government representative who will answer your questions.

Gulf Oil Co.-U. S.

By: /s/ B. F. Short
B. F. SHORT

Equal Employment Opportunity
Commission

By: /s/ James R. Anderson
JAMES R. ANDERSON

Enclosure

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